89-917 (1)

No. _____

Supreme Court, U.S.
FILED
DEC 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION , et al.

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP, HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

v.

THE BANK OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT M. MUSSELMAN
413 Seventh Street, N.E.
Charlottesville, VA 22901
Telephone (804) 977-4500
Attorney for Miami Center Limited Partnership, Holywell Corporation, Miami Center Corporation, and Chopin Associates

THEODORE B. GOULD, pro se
2564-B Ivy Road
Charlottesville, VA 22901
Telephone (804) 295-7125

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a bankruptcy court has authority to allow reimbursement of *postpetition* and *postconfirmation* attorneys' fees and costs to the secured holder of an "undersecured" claim based on an agreement allowing for the payment of attorneys' fees incurred in a reorganization proceeding.

2. Whether the application of the "Bankruptcy Rule", codified in 11 U.S.C. § 506(a), precludes allowing as an unsecured claim, with a priority superior to valid unsecured claims of "insiders", the demand of the secured holder of an undersecured claim for attorneys' fees and costs.

3. Whether the application of the "Reasonableness" Standard forbids the allowance of unitemized amounts of fees for services rendered by attorneys for a secured creditor in their pursuit of unsuccessful claims unrelated to the collection expenses provided for under an agreement with the debtor.

PARTIES TO THE PROCEEDINGS

Petitioners Miami Center Limited Partnership, Miami Center Corporation, Theodore B. Gould, Chopin Associates, and Holywell Corporation were Appellants before the United States Court of Appeals for the Eleventh Circuit. Each of the Petitioners separately filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, in the United States Bankruptcy Court for the Southern District of Florida.

Petitioner Miami Center Limited Partnership (hereinafter referred to as "MCLP") is a limited partnership formed in accordance with the laws of the State of Florida in 1979, consisting of forty (40) units of limited partnership interests, owned by twenty-five (25) separate persons, for the business purpose of engaging in the development of a mixed-use commercial real estate project in Miami, Florida, referred to as the "Miami Center."

Petitioner Holywell Corporation (hereinafter referred to as "Holywell"), incorporated in the State of Delaware in 1976, owns ten (10) of the units of MCLP's limited partnership interests and is the stockholder parent of Miami Center Corporation.

Petitioner Miami Center Corporation (hereinafter referred to as "MCC"), incorporated in the State of Florida in 1979, is MCLP's corporate general partner.

Petitioner Theodore B. Gould is a resident of Albemarle County in the Commonwealth of Virginia,

PARTIES TO THE PROCEEDINGS (Cont.)

Holywell's sole stockholder, and MCLP's individual general partner.

Petitioner Chopin Associates (hereinafter referred to as "Chopin"), a general partnership of MCC and Theodore B. Gould, formed in accordance with the laws of the State of Florida in 1979, leased certain land located in Miami, Florida, to MCLP for the development of the Miami Center in accordance with a Ground Lease Agreement, entered into in 1980.[1]

Respondent The Bank of New York, an Appellee below, was the interim construction lender for the development of the Miami Center, evidenced by various notes issued by Chopin Associates and the Miami Center Limited Partnership, secured by mortgages, providing for the reimbursement of attorney's fees and costs,[2] as follows:

---

[1] The Ground Lease Agreement was reviewed and approved by The Bank of New York as the interim lender pursuant to tripartite buy-sell agreements between The Bank of New York, the financial institutions that had issued permanent loan commitments, and the borrowers. The Ground Lease Agreement's provisions subordinated The Bank of New York's liens to Chopin's fee and lessor interests as follows:

> "[T]he holder of any first mortgage . . . on the Lessee's leasehold estate hereunder and in any event any such mortgage . . . placed on the Lessor's fee estate in the leased premises shall be subject and subordinate to this lease. . . ."

[2] On December 19, 1984, The Bank of New York filed a Proof of Claim in each of the separate proceedings stating,

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

"If this note shall not be paid at maturity or according to the terms thereof . . . it may be placed in the hands of *an* attorney at law for *collection*, and in that event each party liable for the payment thereof . . . hereby agrees to pay the holder hereof in addition to the sums . . . stated, *a reasonable sum as an attorney's fee*, which shall include . . . attorney's fees incurred in any . . . bankruptcy, reorganization . . . including appellate proceedings, whether such proceedings arise before or after entry of a final judgment. It is also agreed that this contract shall be construed in all respects and enforced according to the *laws of the State of Florida.*" [Chopin Associates $23,000,000 Note issued to The Bank of New York on March 27, 1980; Miami Center Limited Partnership $47,500,000 Note and $42,000,000 Note issued to The Bank of New York on March 27, 1980][3] (Emphasis added)

(Continued from previous page)

pertinent to the case *sub judice*, that "costs and expenses . . . to the date of filing of the petition [were] in the approximate sum of $831,563.72" and

> "This claim does *not* include interest and attorneys fees and costs which accrue *after* the commencement of the case, the rights to which are expressly reserved." [Emphasis added]

[3] The original notes in the total principal amounts of $112,500,000 also contained the following "non-recourse" provisions:

> "The holder hereof agrees *not* to seek any deficiency judgment against the Borrower, or any member thereof, in any action to foreclose the Mortgage . . . and agrees that in the event that any suit is

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

"If this Note shall be *collected* by legal proceedings or through any court or shall be referred to *an attorney* because of any default, MCLP and Chopin jointly and severally agree to pay *attorney's* fees and court costs incurred by the Lender and any of the Lender's participants in connection therewith." [Various additional Notes issued by the Miami Center Limited Partnership and Chopin Associates to The Bank of New York from May 6, 1982 to December 21, 1983]

Respondent The Bank of New York filed a proposed amended consolidated plan of reorganization on behalf of the debtors in which the following pertinent statements were made:

"Article I, *DEFINITIONS, Claim:* Any right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment against any of the Debtors in existence *on or as of their respective Petition Dates* as described in Section 101(4) of the Code." (Emphasis added)

"*BNY Debt:* The indebtedness, including interest at the pre-default contract rate to January 31, 1984 and post-default contract rate from February 1, 1984, due to BNY from MCLP and Chopin

---

(Continued from previous page)

brought against the Borrower for . . . a money judgment, any judgment obtained in such a suit will be enforced *only* against (i) the Property, the accounts receivable, the contract rights and the rents, issues, profits, proceeds and income therefrom. . . ."

PARTIES TO THE PROCEEDINGS (Cont.)

in the amount of approximately $234,342,743 as of March 14, 1985 plus expenses of approximately $1,611,563 to March 14, 1985."

"Article II: *Substantive Consolidation:* . . . As a result of substantive consolidation of the Debtors, all Claims between and among the Debtors are eliminated by this Plan, including without limitation, all pre-petition claims, all claims, if any, relating to the ground lease between Chopin and MCLP. . . ."

"Article III, *CLASSIFICATION OF CLAIMS AND INTERESTS, Class* 2 – The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and *at the post-default contract rate thereafter, attorneys' fees, costs and expenses,* as provided in the documents evidencing such claims and *as authorized under applicable law,* as the same are allowed and ordered paid by the Court." (Emphasis added)

"Article IV, *MEANS FOR EXECUTION OF THE PLAN: Sale of Miami Center* – The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000. . . .The purchase price would be paid and applied in the following manner: (a) BNY would receive *a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date.* . . .Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell loan,[4]. . . .(Emphasis added)

---

[4] On October 14, 1983, Petitioner Holywell Corporation made a $1,750,000 loan from the Bank of New York, secured by

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

> Upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released."
>
> "Article VI, *TREATMENT OF CLAIMS AND DISTRIBUTION*, . . . The Class 2 Claim consisting of the principal of the BNY Debt and interest thereon at the pre-default *contract rate to the Miami Center Closing Date* shall be paid and satisfied in accordance with the provisions of Article IV hereof." (Emphasis added)

Fred Stanton Smith, appointed as Trustee of the Miami Center Liquidating Trust, for the purpose of carrying out the provisions of the amended consolidated plan of reorganization filed by the Bank of New York on behalf of the debtors, is an interested party.[5]

(Continued from previous page)

Theodore B. Gould's guarantee of repayment. Said note provided that in the event of default and nonpayment:

> "If this Note shall be *collected* by legal proceedings or through any court or shall be referred to an attorney because of any default, Borrower agrees to pay all *attorney's* fees and court costs incurred by the Lender in connection therewith."

[5] On October 10, 1985, in accordance with the provisions of the plan of reorganization, Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, conveyed title of the Miami Center to the City National Bank of Miami, the Trustee under a certain land trust No. 5008793, pursuant to an Amended Contract of Sale. Fred Stanton Smith, having sought and obtained an indemnity holding him personally harmless for any claims " . . . as a result of the execution of the Contract

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

Other interested parties include the United States of America, the Commonwealth of Virginia, the Miami

---

(Continued from previous page)

. . . or any other provision of the Plan," acquiesced in the Purchaser taking a credit on behalf of the Bank of New York for postpetition interest in the amount of *$27,050,115.02* as the secured holder of an undersecured claim, and also acquiesced in a postconfirmation modification of Article IV, *Means For Execution Of The Plan*, App. 40-41, without notice, hearing, or court approval, amending such provisions releasing the debtors jointly and severally from personal liability under the mortgages, security instruments, and notes secured thereby as follows:

> "Nothing herein contained shall release the Debtors from the following obligations and liabilities (the "Remaining Liabilities") and other collateral to secure such Remaining Liabilities"
>
> . . .
>
> 3. All expenses of the Releasor including, but not limited to, attorneys fees, consultant's fees and disbursements, as set forth in paragraph 4 of the Contract to the Miami Center Closing Date (as defined in the Contract).
>
> The Remaining Liabilities shall *continue to be personal obligations and liabilities of the Debtors*, payable from the Miami Center Liquidating Trust, until the same are paid or are discharged or released by separate written instrument or court order."

Paragraph 4 of the Amended Contract of Sale, October 10, 1985, states as follows:

> "Nothing herein contained shall be deemed to preclude or prohibit the Bank of New York, in accordance with the reservations contained in the Plan

(Continued on following page)

PARTIES TO THE PROCEEDINGS (Cont.)

Center Joint Venture, and corporate entities related to Petitioner Holywell Corporation and defined as "Affiliated Creditors" in the plan of reorganization filed by the Bank of New York on behalf of the debtors. The Plan's Article I, *Definitions*, defined "Affiliated Creditors" as including Parkwell, Inc., Orion Industries, Inc., Holywell Construction Company, Charleston Center Corporation, 1300 North 17th Street Associates, Eleven DuPont Circle Associates, Pietro Belluschi & Associates, Inc. ("PBA, Inc."), Holywell Management of Florida, Inc., Orion Engineering Services, Whitehall Building Services, Whitehall Security Corporation (Fla.), Holywell Telecommunications Company, and Holywell Leasing Company. The claims of "Affiliated Creditors" were subordinated as "insiders" to Class 8, based upon a process of classification.

(Continued from previous page)

> and the adversary proceeding on the amount, priority and validity of the Bank's lien, from seeking and obtaining an allowance by the Court, and if allowed payment by the Seller of all of its costs, expenses and fees incurred in connection with its loans to Debtors and the Bankruptcy Proceedings."

Respondent The Bank of New York simultaneously granted the Miami Center Liquidating Trust a release, stating:

> "The Liquidating Trust shall have no liability and is released of any liability in connection with the Notes and Mortgages which constitute the Bank's mortgages and obligations for which said mortgages were executed."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES xi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 3

PERTINENT STATUTORY PROVISIONS 3

STATEMENT OF CASE 7

REASONS FOR GRANTING THE WRIT 13

I. Attorneys' Fees And Costs Provided For Under An Agreement Are Not Allowable To A Secured Holder Of An "Undersecured" Claim 13

II. The Allowed Unsecured Claim For Attorneys' Fees And Costs Of A Secured Holder Does Not Have A Priority Superior To Valid Undisputed Claims Of Insiders 18

III. The "Reasonableness" Standard Precludes The Reimbursement Of Fees In An Unspecified Amount For Services Rendered By Attorneys On Unsuccessful Claims 20

CONCLUSION 29

APPENDICES are bound herewith and contain a separate table of contents.

TABLE OF AUTHORITIES

Page

CASES:

The Bank of New York v. Miami Center Joint Venture, et al., 51 B.R. 56 (Bkrtcy. 1985) 22

Blum v. Stenson, 465 U.S. 886 (1984) 13, 20

Hensley v. Eckerhart, 461 U.S. 424 (1983) 21, 22

In re Beck Industries, 479 F. 2d 410 (2nd Cir. 1973) 9

In re Louisville Storage Co., 21 F. Supp. 897 (W.D. Ky. 1936) 28

In re Mobile Steel Co., 563 F. 2nd 692 (5th Cir. 1977) 20

In re Unishops, 494 F. 2d 689 (2nd Cir. 1974) 9

In re U.S. Truck Co., 800 F. 2d 581 (6th Cir. 1986) 20

In re Walsh Construction, 669 F.2d 1325 (9th Cir. 1982) 25

In the Matter of First Colonial Corporation of America, 544 F. 2d 1291 (5th Cir. 1977) 23

Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974) 20, 21, 23

Johnson v. Norris, 190 Fed. 459 (5th Cir. 1911) 25

Randolph v. Scruggs, 190 U.S. 533 (1903) 25

Sexton v. Dreyfus, 219 U.S. 339 (1911) 27

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 108 S. Ct. 626 (1988) 16, 17, 27

United States v. Ron Pair Enterprises, Inc., 109 S. Ct. 1026 (1984) 16, 27

TABLE OF AUTHORITIES – Continued

Page

United States National Bank, et al. v. Chase National Bank, et al., 331 U.S. 28 (1947) 19

Vandston Bondholders Committee v. Green, 329 U.S. 156 (1946) 18, 26

STATUTES:

United States Code:

11 U.S.C. § 101(4) v

11 U.S.C. § 327 15

11 U.S.C. § 330(a) 15

11 U.S.C. § 361(3) 27

11 U.S.C. § 502(b) 3, 14, 26

11 U.S.C. § 503(b)(2) 15

11 U.S.C. § 503(b)(3) 3, 7, 15

11 U.S.C. § 503(b)(4) 3, 6, 15

11 U.S.C. § 506 ..... *passim*

11 U.S.C. § 510(c) 19

11 U.S.C. § 1103 15

11 U.S.C. § 1123(a)(5)(G) 23

11 U.S.C. § 1125 25

11 U.S.C. § 1129(a)(2) 25

11 U.S.C. § 1129(b)(1) 19

11 U.S.C. § 1141(a) 16

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1334(d) 9

LEGISLATIVE HISTORY:

H. R. Rep. 95-595, 95th Cong. 1st Sess. (1977) 25

TREATISES:

Collier on Bankruptcy, Section 502.02 (15th Ed. 1984) 26

Collier on Bankruptcy § 506.05, n. 5 (15th Ed. 1986) 8

LAW JOURNALS:

Herzog, *Fees and Allowances in Bankruptcy*, 36 Conn. B. J. 374 (1962) 25

No. _____

In The

Supreme Court of the United States

October Term, 1989

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, THEODORE B. GOULD,
and HOLYWELL CORPORATION,

Petitioners,

v.

THE BANK OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on September 5, 1989, denying the Petition for Rehearing and Suggestion of Rehearing In Banc upon that court's original opinion, entered on June 30, 1989.

OPINIONS BELOW

The judgment of the United States Court of Appeals, entered on September 20, 1989, is printed in the

Appendix attached hereto ("App") at App. 1. The order of the Eleventh Circuit Court of Appeals, entered on September 5, 1989, denying the Petition for Rehearing and Suggestion of Rehearing In Banc, is printed at App. 3. The Court of Appeals' original order, entered on June 30, 1989, is printed at App. 5.

The opinion of the district court, entered on June 30, 1988, affirming the bankruptcy court's Memorandum Decision on the amount of The Bank of New York's fees and expenses, is printed at App. 9.

The order of the district court, entered on September 7, 1988, denying the Motion for Rehearing concerning the issues of (a) whether a bankruptcy court has authority to allow the payment of *postpetition* and *postconfirmation* attorneys' fees as a general unsecured claim, (b) whether the allowance of attorneys' fees provided for in an agreement should have been *limited* to actual collection expenses under such an agreement, and (c) whether an unsecured claim for attorneys' fees should be accorded a priority *superior* to the claims of insiders, is printed at App. 7.

The bankruptcy court's "Memorandum Decision On Amount of Bank's Fees and Expenses," entered on March 11, 1987, is printed at App. 14. The bankruptcy court's original "Memorandum Decision On Estate's Liability for Bank's Fees and Expenses," denying The Bank of New York's application for the payment of attorneys' fees as an administrative expense, entered on November 5, 1986, is printed at App. 27.

Other opinions of the lower courts, which are related to the Court's consideration of this Petition, are printed in the Appendix and, where such opinions have been

reported, the citation is indicated in the Table of Contents to the Appendix.

STATEMENT OF JURISDICTION

Petitioners filed an appeal to the Eleventh Circuit Court of Appeals from an order of the United States District Court for the Southern District of Florida, denying a Motion For Rehearing and affirming the bankruptcy court's allowance of the reimbursement to The Bank of New York for attorneys' fees and costs for a period ending April 30, 1986, as an unsecured claim with a priority superior to valid insider claims, notwithstanding the prior finding in the bankruptcy court's Confirmation Order, entered on August 8, 1985, that The Bank of New York's claim was "undersecured," App. 33, and also its prior decision, entered on November 5, 1986, denying The Bank of New York's application for reimbursement of attorneys' fees and expenses as an administrative expense payable in accordance with 11 U.S.C. Section 503(b)(3) and (4), App. 27.

The jurisdiction of this Court to review the judgment below is invoked under 28 U.S.C. Section 1254(1).

PERTINENT STATUTORY PROVISIONS

The applicable provisions of the Bankruptcy Reform Act of 1978 are set forth in the Appendix hereto at page 73. In particular, this case involves the administration of the bankruptcy laws with respect to the following provisions of title 11:

11 U.S.C. Section 502(b) provides as follows:

"Except as provided in subsection (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after a notice and a

hearing, shall determine the amount of such claim in lawful currency of the United States *as of the date of the filing of the petition*, and shall allow such claim in such amount, except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) *such claim is for a debt that is unmatured on the date of the filing of the petition* and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

11 U.S.C. Section 503(b)(3) provides as follows:

"(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian;

11 U.S.C. Section 503(b)(4) provides as follows:

"(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services, other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;"

11 U.S.C. Section 506(a) provides as follows:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is *a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property,* or to the extent of the amount subject to setoff, as the case may be, *and is an unsecured claim to the extent that the value of such creditor's interest* or the amount so subject to setoff *is less than the amount of such allowed claim.* Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

11 U.S.C. Section 506(b) provides as follows:

"To the extent that an allowed secured claim is secured by property *the value of which,* after any recovery under subsection (c) of this section, *is greater than the amount of such claim,* there shall be allowed to the holder of such claim, interest on such claim, *and* any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

STATEMENT OF CASE

On August 22, 1984, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, Holywell Corporation, and Theodore B. Gould [hereinafter referred to as "Petitioners"] each separately filed a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Reform Act of 1978, as amended, in resporse to the commencement of foreclosure proceeding related to the development of a commercial mixed-use real estate project referred to as the "Miami Center." The proceedings were assigned to Chief Bankruptcy Judge Thomas C. Britton of the United States Bankruptcy Court for the Southern District of Florida. Chief Bankruptcy Judge Britton was required to recuse himself from these proceedings on August 27, 1987, having engaged in an *ex parte* conference on May 15, 1987, in which he made comments expressing personal bias against Petitioner Theodore B. Gould and other related parties.

On August 8, 1985, the bankruptcy court entered an order confirming a plan of reorganization, proposed by The Bank of New York on behalf of the debtors, in which the following pertinent finding of fact was made:

> "[T]he Bank of New York, the major creditor whose claim is undersecured. . . ." App. 33

On November 5, 1986, a Memorandum Decision On Estate's Liability For Bank's Fees And Expenses, *denied* The Bank of New York's application for reimbursement of attorneys' fees and expenses in the total amount of *$1,855,458* as an *administrative* expense payable in accordance with 11 U.S.C. Section 503(b)(3) and (4). The bankruptcy court nevertheless concluded, in relevant part, as follows:

> "Although Section 506 does not expressly preserve an unsecured claim, it does not foreclose one. I see no reason to presume that *the unsecured claim is barred simply because it exceeds the value of the pledged collateral.* 3 Collier On Bankruptcy, Sec. 506.05 n. 5 (15th Ed. 1986)" [Emphasis added] App. 30.

On March 11, 1987, the following pertinent findings of fact and conclusions of law were made in the bankruptcy court's Memorandum Decision On Amount Of Bank's Fees And Expenses:

> "A precise count of *the actual time spent in unreasonable duplication is prevented here* because the applicants frequently included other services in the same time charge without a breakdown. . . ." [Emphasis added] App. 20.
>
> "The necessary and reasonable participation by the New York firm [Emmet, Marvin & Martin], which could not institute foreclosure and by more than one Miami firm during this phase was nominal." App. 19.
>
> "If the Bank preferred the comfort of consultive participation by more than one firm for each of the two distinct phases involved in the collection of its claim, it had every right to purchase such comfort. *It is not, however, entitled to recover that additional cost from this estate at the expense of other claimants.*"[1] [Emphasis added] App. 19.

The bankruptcy court, however, concluded as follows:

> "The Trustee argues that time spent by the Bank in defending appeals [*after* confirmation] and *in litigation involving non-bankrupt subsidiaries* of the debtors ought not to be included in the

---

[1] Nonetheless, the bankruptcy court thereafter allowed the Bank of New York $490,840 for services rendered by Emmet, Marvin & Martin, representing forty-four (44) percent of the total award.

recoverable collection expenses. I disagree."[2] [Emphasis added] App. 22.

"I also reject the trustee's contention that fees paid since the fall of 1985 by a different entity, M. C. Holdings Partners, should not be considered for reimbursement." App. 22.

" . . . *it became necessary in this case for the Bank to pursue the assets of non-bankruptcy subsidiaries owned by the debtors and, therefore, assets subject to disposition under the Bank's plan.*[3] No party has

---

[2] On June 23, 1983, Holywell Corporation entered into an Assignment And Security Agreement granting to The Bank of New York its right, title, and interest as "Stock Collateral" in the issued and outstanding shares of its wholly-owned subsidiaries as additional security for MCLP's performance in accordance with a certain Building Loan Agreement.

Article 8, *Remedies On Default*, of said Assignment And Security Agreement, *limited* The Bank of New York's authority as a secured party in the event of default to the *sale* of the "Stock Collateral," stating in relevant part as follows:

" . . . the Bank may immediately, without demand or performance and without notice of intention . . . sell at any time . . . at public or private sale . . . in the states of New York, Florida or elsewhere, . . . the whole or any part of the Collateral."

[3] See 28 U.S.C. Section 1334(d), which provides that "[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate. Also see *In re Unishops*, 494 F.2d 689, 690 (2nd Cir. 1974):

" . . . the bankruptcy court cannot expand its jurisdiction over a debtor's subsidiary absent a showing that the subsidiary is a mere sham rather than a viable entity.";

In re Beck Industries, Inc., 479 F.2d 410, 419 (2nd Cir. 1973):

"The corporate veil cannot be disregarded merely because it would make for an efficient and economical administration of the debtor's estate."

> shown me that New York law requires the exclusion . . . of these expenses."[4] [Emphasis added] App. 22.

The bankruptcy court allowed reimbursement of attorneys' fees to The Bank of New York (a) as a collection expense in an unspecified amount for undocumented prepetition services, (b) $243,953 for services rendered *after* confirmation and payment of The Bank of New York's allowed secured claim, and (c) unspecified fees for postpetition services rendered prior to the Plan's Effective Date of October 10, 1985.

On June 30, 1988, an Order Of Affirmance, App. 9, was entered on the bankruptcy court's Memorandum Decision On Estate's Liabilities For Fees And Expenses of November 5, 1987 ["the liability memorandum"], and the Memorandum Decision On Amount Of Bank's Fees And Expenses of March 11, 1987 [the "fee award memorandum"], in which the following pertinent finding of fact was made:

> "The liability memorandum determined that the Bank of New York would be allowed a general unsecured claim, subordinate to the claims of other general unsecured non-insiders, for the attorneys' fees incurred in the collection of loans to Holywell,[5] including fees incurred in the bankruptcy proceeding." App. 9-10.

---

[4] 4 The bankruptcy court's reference to "New York law" was error. Although the loan documents provided that they are to be construed in terms of the laws of the State of Florida, the issue before the court concerned the administration of the bankruptcy laws.

[5] The district court erred in referring to Holywell Corporation as the borrower of the notes for which The Bank of New

(Continued on following page)

The district court thereupon made the following conclusions of law:

(Continued from previous page)

York had filed its Proof of Claim and application for the reimbursement of attorneys' fees. The notes issued were as follows:

> Note dated March 27, 1980, made by Chopin to The Bank of New York, in the principal amount of $23,000,000.
>
> Note dated March 27, 1980, made by MCLP to The Bank of New York, in the principal amount of $47,500,000.
>
> Note dated March 27, 1980, made by MCLP to The Bank of New York, in the principal amount of $42,000,000.
>
> Note dated May 26, 1982, made by MCLP and Chopin to The Bank of New York, in the principal amount of $24,000,000.
>
> Note dated as of August 27, 1982, made by MCLP and Chopin to The Bank of New York, in the principal amount of $11,000,000.
>
> Note dated December 2, 1982, made by MCLP and Chopin, in the principal amount of $8,000,000.
>
> Note dated December 9, 1982, made by MCLP and Chopin to The Bank of New York, in the principal amount of $10,000,000.
>
> Note dated January 20, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $8,000,000.
>
> Note dated June 23, 1983, made by MCLP and Chopin to The Bank of New York in the principal amount of $5,300,000.
>
> Note dated December 13, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $12,525,419.83.

(Continued on following page)

"This liability was predicated on 506(a) which 'separates an undersecured creditor's claim into two parts: he has a secured claim to the extent of the value of his collateral; *he has an unsecured claim for the balance of his claim.*' Notes of Committee On The Judiciary, Senate Report 95-989 (emphasis added). The attorneys fees for collection of the debt are part of that claim."

"The Bank of New York has an allowable[3] claim inasmuch as it is based on a contractual right under the loan documents signed by the parties. While the issue has not been squarely addressed in this circuit, numerous decisions exist in other circuits allowing such claims.[4]

---

[3] Appellant argues that the Supreme Court decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 108 S.Ct. 626 (1988) holds that such awards are precluded under 11 U.S.C. Section 506(b). However the context of that case is completely inapposit [sic]. . . .

[4] The cases cited by Appellant Holywell Corporation do not support their proposition: their cited cases merely address the issue of whether a creditor seeking recovery under section 506(b) must be an oversecured creditor.

(Continued from previous page)

Note dated December 13, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $1,800,957.96.

Note dated December 13, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $87,874.33.

Note dated December 21, 1983, made by MCLP and Chopin to The Bank of New York, in the principal amount of $1,916,966.59.

On August 6, 1988, the district court denied, without hearing, the Appellants' Motion For Rehearing and Memorandum Of Law, filed on July 13, 1988, in which the Petitioners requested rehearing on the following three issues:

> "1. The Bank's unsecured fee claim cannot include postpetition attorneys' fees.
>
> 2. The Bank's unsecured claim cannot include fees incurred in matters not necessary to enforcement of its contract rights.
>
> 3. There is no legal basis for according the Bank's claim a priority ahead of the claims of insiders."

On June 30, 1989, a panel of the Eleventh Circuit Court of Appeals, consisting of Circuit Judges Fay and Hatchett, and Senior District Judge Walter Hoffman, entered an opinion, App. 5, affirming the judgment of the district court below for the reasons stated in and based upon the memorandum decisions of the bankruptcy court and the order of the district court affirming those decisions.

REASONS FOR GRANTING THE WRIT

I. Attorneys' Fees And Costs Provided For Under An Agreement Are Not Allowable To A Secured Holder Of An "Undersecured" Claim.

In *Blum v. Stenson*, 465 U.S. 886, 896 (1984), this Court's opinion stated that "[w]here, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."

(a) The bankruptcy court's Memorandum Decision allowing total recoverable fees of $1,126,824 and costs of

$84,670, as an unsecured claim to The Bank of New York as the secured holder of an "undersecured" claim, is directly inconsistent with the Bankruptcy Code and the confirmed Plan's provisions.

If an objection is made to a claim, Section 502(b) provides, in relevant part, as follows:

> "The court . . . shall determine the amount of such claim . . . as of *the date of the filing of the petition* and shall allow such claim in such amount except to the extent . . . (5) *such claim is for a debt that is unmatured* on the date of the filing of the petition. . . ." (Emphasis added)

The bankruptcy court's award of attorneys' fees, is for the period from June 9, 1983,[6] to April 30, 1986.

---

[6] Article III, *Classification Of Claims And Interests*, precludes the payment of *predefault* attorneys' fees in the amount of $132,253, for the period prior to February 1, 1984, no documentation of the predefault services having been rendered, the Plan providing in relevant part as follows:

> "*Class 2* – The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court."

No application was made for and no documentation was provided to substantiate a "computational error" in the amount of $334,920.87. The doctrine of equitable estoppel precluded The Bank of New York from claiming compensation for such computational error, having failed to revise its Fee And Expense Application and having stated that "It should be noted that the Bank is *not* seeking an increase in the amount of fees and expenses allowed by reason of such oversight or computation errors." [T. F. Noone, "Affidavit In Connection For Allowance Of Attorneys' Fees, Costs . . . Incurred By The Bank of New York," January 13, 1987, pp. 2-3]

However, the Bankruptcy Code and the confirmed Plan's provisions *limit* the court's authority to the allowance of a claim as of the date of the filing. In the instant case, the bankruptcy court was required to determine the amount of The Bank of New York's claim for the reimbursement of attorneys' fees as of August 22, 1984, the date of filing of the petitions. This it never did.

Section 503(b)(2) allows compensation and reimbursement under Section 330(a) to attorneys employed as professional persons under Section 327 or 1103 or to the debtor's attorney for the actual, necessary costs and expenses of preserving the estate, App. 74. Section 503(b)(4) limits reimbursement to a creditor to the reasonable compensation for professional services rendered by an attorney to an entity whose expense is allowable under paragraph (3) of that subsection. App. 75. The Bank of New York was not such an "entity." None of the provisions of Section 503(b)(3) are applicable to the reimbursement of The Bank of New York's attorneys' fees in an *unspecified* amount for the period from August 22, 1984, to October 10, 1985. The bankruptcy court's Memorandum Decision On Estate's Liability For Bank's Fees And Expenses *denied* The Bank of New York's application for the payment of attorneys' fees as an administrative expense under Section 503.[7]

---

[7] On September 27, 1985, the bankruptcy court entered an order requiring that application for all administrative claims be filed no later than October 17, 1985 [C.P. 1014]. The Bank of New York first filed its application on June 13, 1986, requesting that the bankruptcy court authorize reasonable compensation for its attorneys to the extent that the Bank, through its attorneys, made a "substantial contribution benefitting the estate in accordance with Section 503(b)(3) and (4)."

The reimbursement to a creditor as an *unsecured* claim for postpetition attorneys' fees for the period from August 22, 1984, to October 10, 1985, is inconsistent with statutory requirements of Section 503, precluding compensation and reimbursement of attorneys' fees for creditors *except* under subsections (3) and (4).

The reimbursement of attorneys' fees in the amount of $243,953 as a collection expense for services rendered by attorneys *after* confirmation and the full payment of The Bank of New York's allowed secured claim is inconsistent with statutory requirements of Section 1141(a), which provides that the "confirmed plan bind[s] the debtor . . . any entity acquiring property under the plan, and any creditor . . . " Furthermore, the reimbursement of attorneys' fees to a creditor as an allowed unsecured claim for services rendered after the effect of confirmation, is inconsistent with subsection (c) of section 1141, which states that " . . . except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. . . ."[8]

(b) This Court's analysis of the meaning of 11 U.S.C. Section 506 in *The United States v. Ron Pair Enterprises, Inc.*, 109 S.Ct. 1026, 1029-1031 (1989), is applicable to a determination of whether attorneys' fees and costs are reimbursable to the secured holder of an undersecured claim:

---

[8] The confirmed Plan's Article IV, *Means For Execution Of The Plan*, limits the reimbursement of expenses, stating:

> "BNY would receive a credit for the amount of the BNY Debt plus expenses *to* the Miami Center Closing Date [October 10, 1985]." (Emphasis added) App. 39.

> "Section 506, [footnote omitted] . . . governs the definition and treatment of secured claims. . . . Subsection (a) of Section 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured. [footnote omitted] Subsection (b) is concerned specifically with oversecured claims . . . .Section 506(b) allows a holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, 'interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'. . . .[T]*he phrase 'interest on such claim' stands independent of the language that follows.* 'Interest on such claim' is not part of the list made up of 'fees, costs or charges,' nor is it joined to the following clause so that the final 'provided for under the agreement' modifies it as well. [citation omitted. . . .*By the plain language of the statute, the two types of recovery are distinct.* [footnote omitted]" (Emphasis added) 109 S.Ct. at 1029-1031.

Thus, subsection (b) of Section 506 allows for the payment of any reasonable postpetition fees and costs provided for under the agreement under which such claim arose *only* to such extent that an allowed claim is secured by property the value of which is greater than the amount of such claim. In the present case, the "non-recourse" provisions of the notes in the amount of $23,000,000, $42,000,000, and $47,500,000 precluded The Bank of New York from seeking recovery of collection expenses for attorneys' fees, except against "the Property, accounts receivable, the contract rights and the rents, issues, profits, proceeds and income therefrom."

This Court's analysis in *United Savings Association of Texas v. Timbers of Inwood Forest*, 108 S.Ct. 626, 630 (1988), of the substantive effect of subsection (b) of section 506

permitting "postpetition interest to be paid only out of the *'security cushion,'* [an] undersecured creditor, who has no such cushion, falls within the general rule *disallowing* postpetition interest," (emphasis added) is applicable to the reimbursement of any reasonable postpetition fees and costs provided for under the agreement from which such claim arose.

It does not make common sense to conclude that it was the intent of Congress to *disallow* the payment of postpetition interest on an undersecured claim and allow the payment of attorneys' fees and costs on such claims *prior* to the payment at least of the principal of *all* unsecured claims.

II. The Allowed Unsecured Claim For Attorneys' Fees And Costs Of A Secured Holder Does Not Have A Priority Superior To Valid Undisputed Claims Of Insiders.

The equitable principle of denying the secured holder of an undersecured claim the right to recover postpetition interest prior to the payment of the principal of a valid unsecured creditor's claim is also applicable to the attorneys' fees and costs of an undersecured creditor:

> "Section 506(b)'s denial of postpetition interest to undersecured creditors merely codified pre-Code bankruptcy law, in which that *denial was part of the conscious allocation of reorganization benefits and losses between undersecured and unsecured creditors.* 'To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors.' *Vandston Bondholders Protection Committee v. Green,* 329 U.S. 156, 164 (1946). It was considered *unfair* to allow an undersecured creditor to recover interest from the estate's unencumbered assets before

> unsecured creditors had recovered any principal." (Emphasis added) 108 S.Ct. at 631.

Section 506(a) codifies the pre-Code "Bankruptcy Rule" permitting a " . . . secured creditor to receive dividends along with the general creditors only on the balance remaining after the value of the security has been determined and deducted from the claim." *United States National Bank, et al. v. Chase National Bank, et al.*, 331 U.S. 28, 34 (1947). Thus, this Court has concluded as follows:

> " . . . an undersecured creditor is entitled to *'surrender or waive his security and prove his entire claim as an unsecured one.'* [citation omitted] Section 726(a)(5) therefore requires no more than that undersecured creditors receive postpetition interest from a solvent debtor *on equal terms with unsecured creditors* rather than ahead of them. . . ." (Emphasis added) 108 S.Ct. at 634.

Since this Court's precedent *only* grants the holder of an undersecured claim the alternative right to "waive his security and prove his entire claim" on an unsecured basis, an undersecured creditor is entitled to receive reasonable postpetition fees and costs on such claim from a solvent debtor *only* on equal terms with all unsecured creditors, including the valid allowed unsecured claims of insiders.[9]

---

[9] See 11 U.S.C. Section 510(c); S.D. Fla., *Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. The Bank of New York*, No. 85-3230-Civ-Atkins, March 24, 1987, *reversed* the bankruptcy court's Confirmation Order, as amended *nunc pro tunc* on November 10, 1986, concluding that the plan wrongfully subordinated MCJV's claim, and, thus, that the plan was unfair and inequitable. The district court concluded that the amended consolidated plan of reorganization proposed by The Bank of New York on behalf of the debtors did not satisfy 11 U.S.C. Section 1129(b)(l) [" . . . the insider label is *not* sufficient,

(Continued on following page)

In the present case, The Bank of New York did not waive its security and prove its entire prepetition claim on an unsecured basis, rather *only* its claim for reimbursement of attorneys' fees, costs, and loan expenses. The Bank of New York asserted that its secured claim *included* unmatured interest and expenses from the date of commencement of the proceedings to the "Miami Center Closing Date." *Art. IV* of the Plan, App. 39.

As a matter of law, the contractual documents, and the Plan's provisions, The Bank of New York's unsecured claim for the reimbursement of attorneys' fees and costs as a collection expense must be limited to the "reasonable" fees and costs of *an* attorney, licensed to practice in the State of Florida, for the period from the declaration of a notice of default on February 1, 1984, to the date of the commencement of the proceedings on August 22, 1984.

III. The "Reasonableness" Standard Precludes The Reimbursement Of Fees In An Unspecified Amount For Services Rendered By Attorneys On Unsuccessful Claims.

(a) This Court's analysis of the "Reasonableness" Standard in *Blum v. Stenson* as applied to the allowance of attorneys' fees stated, in relevant part, as follows:

> " 'Results obtained' is one of the 12 factors identified in *Johnson v. Georgia Highway Express*, 488

(Continued from previous page)

in and of itself, to justify the subordination of a claim. Insiders' claims and rights must be treated in the same manner as other rights and claims in the absence of proof of nefarious or inequitable conduct directed toward and resulting in harm to creditors."]; *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977); and *In re U.S. Truck Co.*, 800 F.2d 581 (6th Cir. 1986).

> F.2d, at 718, as relevant to the calculation of a reasonable attorney's fee. It is 'particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief.' *Hensley, supra,* at 434 (fee award must be reduced by the number of hours spent on unsuccessful claims)." 465 U.S. at 900.

The "Reasonableness" Standard set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, at 717-719 (5th Cir. 1984), for the determination of an award of attorney's fees, as applied in *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), stands for the rule that, if a plaintiff had received only partial or limited success, even where his claims were interrelated, nonfrivolous, and raised in good faith, the relationship between the amount of the fee awarded and the results obtained must be considered:

> " . . . the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. It remains important . . . for the district court to provide a concise but clear explanation of its reasons for the fee award. . . .[T]he district court should make clear that *it has considered the relationship between the amount of the fee awarded and the results obtained." Id.* at 437 (Emphasis added)

In the instant case, the debtor Miami Center Limited Partnership's estate should *not* be held liable for reimbursement of an unspecified amount of attorneys' fees and costs to The Bank of New York, as the Plan's proponent, for an unspecified number of hours spent on its *unsuccessful* claims concerning issues *unrelated* to collection expenses. The Plan *wrongfully* subordinated the Miami Center Joint Venture's claim, and The Bank of New York's claim, *improperly* alleging that leased furniture, fixtures, and equipment were the property of debtor

Miami Center Limited Partnership as "unperfected security agreements," was denied.[10] App. 47-48. The Bank of New York also improperly alleged that property of Holywell Telecommunications Company and Holywell Leasing Company leased to the debtor Miami Center Limited Partnership were either owned by the Miami Center Limited Partnership or debtor Holywell Corporation. The bankruptcy court denied The Bank of New York's allegations on the same basis as its prior decision rejecting The Bank of New York's allegations with respect to the furniture, fixtures, and equipment leased by the Miami Center Joint Venture to the Miami Center Limited Partnership. App. 53.

Although the various courts of appeal have adopted the "Reasonableness" Standard and have recognized the relevance of the results obtained to the amount of a fee award, prior to this Court's opinion in *Hensley v. Eckerhart, supra,* they had adopted varying standards for applying this principle in cases where the plaintiff has not been successful on all claims asserted, 461 U.S. at 431, notwithstanding that " . . . congressional intent to limit awards to prevailing parties requires that . . . unrelated claims be treated as if they had been raised in separate

---

[10] Bkrtcy. S.D. Fla., *The Bank of New York v. Miami Center Joint Venture, et al.*, 51 B.R. 56 (1985); affirmed S.D. Fla., No. 85-3430-Civ-Atkins, June 23, 1986 ["The Bank gave approval of the protective provisions of the leases that would assure MCJV's priority rights as owner. . . .The Bank filed the UCC-1 forms reflecting and recording the priority rights of MCJV as owner. Such rights were superior to those of the Bank as well as to general and unsecured creditors." (p. 3)]; affirmed Eleventh Circuit, No. 86-5609, October 12, 1988.

lawsuits, and therefore *no fee may be awarded for service on the unsuccessful claim.*" 461 U.S. at 435.

(b) The district court abused its discretion in affirming the bankruptcy court's award of attorneys' fees to The Bank of New York, since the bankruptcy court did not properly apply the standards and procedures based upon which the reasonableness of the award could be judged by the "abuse of discretion" standard of review.

The guidelines for the proper application of the "abuse of discretion" standard in the administration of the bankruptcy laws, *In the Matter of First Colonial Corporation of America*, 544 F.2d 1291, 1299 (5th Cir. 1977), citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974), requires that a bankruptcy judge ascertain the nature and extent of an attorney's services. Each attorney seeking compensation is required to file a statement reciting the number of hours worked with a description of "how each of these hours was spent." *Supra* at 1299. If more than one attorney is involved, the bankruptcy court must determine the degree of duplication of effort. A distinction must be made between legal work and investigation, clerical work, compilation of facts, statistics and other work which can be done by nonlawyers. *Supra* at 1300.

After the nature and extent of the services have been determined, the bankruptcy court must assess the value of these services "based upon the reasonableness standard," and " . . . briefly explain the findings and reasons upon which the award is based, including an indication of how each of the 12 factors listed in Johnson affected his decisions." *Supra* at 1300.

The bankruptcy court's findings of fact illustrate the court's abuse of discretion as follows:

> "A precise count of the actual time spent in unreasonableness duplication is prevented here because the applicants frequently included other services in the same time charge without a breakdown." App. 20.
>
> "The Bank also concedes that there was significant duplication in the legal services it received." App. 18.
>
> "The Trustee's analysis is that 90% of the New York [Emmet, Marvin & Martin] firm's time before October 1985 and 80% afterwards include telephone calls or conferences with one or both other firms and that 79% of the nonbankruptcy Miami [Therrel Baisden & Meyer Weiss and Kirkpatrick & Lockhart] firms and 55% of the Miami [Steel Hector & Davis] bankruptcy specialist's time slips contain similar entries." App. 18.
>
> "I agree with the Trustee that the original narrative description of the services provided (except that given by Steel Hector) was woefully inadequate and, even as supplemented in January, leaves much to be desired." App. 21.

The Bank of New York's employment of three separate law firms and 30 different lawyers is *not* a reimbursable collection expense in accordance with the contractual documents. The loan documents specifically limit the Borrower's liability to payment of a "reasonable sum as an attorney's fee." The attorneys' fees and costs of Emmet Marvin & Martin are not compensable as a collection expense in a foreclosure or a bankruptcy proceeding related to property in Florida. The Bank of New York's employment of two separate law firms in Florida for collection is contrary to the loan documents. A careful analysis of the enumeration of time expended by the three separate law firms indicates duplication and triplication of efforts illustrated by conferences and telephone conversations in which two, three, or four lawyers

participated, and billing for court proceedings in which as many as six lawyers represented The Bank of New York.

(c) The doctrine that "[p]ersons who rendered beneficial services to the estate will not be precluded from reimbursement"[11] is applicable *only* " . . . so far as they benefitted the estate." *Randolph v. Scruggs,* 190 U.S. 533, 539 (1903). Fees and costs are *not* reimbursable to a party who has *damaged* third party creditors and the estate.

In the instant case, the bankruptcy court's finding that "the Bank's counsel did all that could have been asked of them and they did it well," App. 16, must be compared with the following uncontroverted facts in the record of the bankruptcy proceedings and the applicable provisions of the Bankruptcy Code:

(1) Although 11 U.S.C. Section 1129(a)(2) requires that the Plan's proponent comply with the provisions of title 11, notably the disclosure requirements of Section 1125, H.R. Rep. 95-595, 95th Cong. 1st Sess. (1977) at 412, notwithstanding the bankruptcy court's "Cash Collateral" Order, entered on December 31, 1984, upon the emergency motion of The Bank of New York, requiring the determination and payment of obligations to the Internal Revenue Service, App. 56, The Bank of New York did *not* disclose that the Plan made no provision for the payment of federal and state income taxes incurred during the administration of the estate[12] and arising from the

---

[11] Herzog, *Fees and Allowances in Bankruptcy,* 36 Conn. B.J. 374 (1962).

[12] The corporate income taxes of Holywell Corporation, consolidated with nondebtor subsidiaries, and the personal

(Continued on following page)

sale of the estate's property[13] on behalf of Holywell Corporation and Theodore B. Gould's bankruptcy estate. App. 70, 71.

(2) The Plan's Article IV, *Means For Execution Of The Plan*, granted the Buyer a credit added to the allowed secured claim of the "BNY Debt" postpetition interest in the amount of *$27,050,115* for The Bank of New York's "undersecured" claim against the purchase price of $255,600,000 payable for the Miami Center, App. 39, notwithstanding that 11 U.S.C. Section 502(b)(2) precludes the allowance of unmatured interest on a claim[14] and 11 U.S.C. Section 506(b) limits the allowance of postpetition

---

(Continued from previous page)

income taxes of debtor Theodore B. Gould's bankruptcy estate arise from taxable income in the amount of *$38,566,768* related to a cash distribution in the amount of *$32,971,830* received from their financial interests as partners in the sale of the property, referred to as the "Washington Properties," during the administration of the estate, of which the Plan's provisions vested possession of *$30,045,532* in cash and securities in the individual appointed as Trustee of the Miami Center Liquidating Trust.

[13] The sale of the Miami Center Limited Partnership's assets represented a net taxable capital gain of *$58,696,802* and an ordinary loss of *$19,861,810* to Holywell Corporation, consolidated with Miami Center Corporation. Theodore B. Gould's bankruptcy estate had a net taxable capital gain of *$18,976,083* and an ordinary loss of *$6,421,123* from the taxable events arising from the Trustee's sale of MCLP's assets in accordance with the Plan's provisions.

[14] See *Vandston Bondholders Committee v. Green*, 329 U.S. 156, 165 (1946); *Johnson v. Norris*, 190 Fed. 459 (5th Cir. 1911); *In re Walsh Construction*, 669 F.2d 1325 (9th Cir. 1982); Collier on Bankruptcy, Section 502.02 (15th Ed. 1984).

interest on a secured claim to the degree to which the collateral's value exceeds the claim.[15]

(3) The Bank of New York did *not* disclose that the Plan's "substantive consolidation" provision, eliminating the payment of ground rent from MCLP to Chopin, was an *impermissible* modification of a contract to which The Bank of New York's liens had been subordinated.

(4) The Plan made no provision for the repayment of "Super-Priority" loans in the amount of *$4,717,405* plus accrued interest previously authorized by the bankruptcy court. The Plan did not provide adequate funds to cure defaults in unexpired leases in accordance with 11 U.S.C. Section 1123(a)(5)(G). The Plan did not satisfy the adequate protection requirements of 11 U.S.C. Section 361(3) entitling an entity to realize from the sale proceeds "the indubitable equivalent of such entity's interest" in property in which the estate has no interest.

(5) The Plan has imposed a burden upon the Trust estate of *$7,191,297* as of October 31, 1989, in carrying costs as interest for the nonpayment of the Miami Center Joint Venture's wrongfully subordinated allowed claim, accruing at a daily rate in the amount of *$5,864*.

---

[15] See *United States v. Ron Pair Enterprises, Inc., supra* at 1031 ["[T]he phrase 'interest on such claim' stands independent of the language that follows. 'Interest on such claim' is not part of the list made up of 'fees, costs or charges,' nor is it joined to the following clause so that the final 'provided for under the agreement' modifies it as well."] *Sexton v. Dreyfus*, 219 U.S. 339 (1911). *United Savings Ass'n of Texas v. Timbers, supra* ["Even more important for our purposes than Section 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims. . . ."]

(6) The burden of the Miami Center Liquidating Trust's administrative expenses in the estimated amount of $2,555,420 has been imposed upon the estate, notwithstanding the "Equitable Fund" doctrine, codified in 11 U.S.C. Section 506(c), that a secured creditor responsible for the appointment of a trustee should pay the estate's additional administrative expenses. *In re Louisville Storage Co.*, 21 F. Supp. 897 (W.D. Ky. 1936) ["It has always been the rule inherent in general principles of equity that the lienholder must bear the expense of bankruptcy administration which is solely for his benefit, or to which he consents, or which he causes."]

Although Congress enacted the Bankruptcy Code to provide a prompt resolution of all bankruptcy causes of action in order to expedite the settlement of a debtor's estate, more than four years have elapsed since the Plan's Effective Date and the entry of an order of substantial consummation. The Plan has not been implemented. The case has not been closed. The assets of the various estates have been commingled. Federal and state income tax returns have not been filed and no reserve has been established for the payment of income taxes incurred during the administration of the estate and arising from the sale of the estate's property.

CONCLUSION

For the foregoing reasons this Court should grant the Writ, and reverse and vacate the judgment of the court below.

Respectfully submitted,

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and HOLYWELL CORPORATION

ROBERT M. MUSSELMAN
ROBERT M. MUSSELMAN & ASSOCIATES
413 Seventh Street N.E.
Charlottesville, VA 22901
(804) 977-4500

THEODORE B. GOULD, *pro se*
2564-B Ivy Road
Charlottesville, VA 22901
(804) 295-7125

APPENDICES

TABLE OF CONTENTS

Page

APPENDICES

A Judgment of Eleventh Circuit Court of Appeals issued as mandate on September 20, 1989...App. 1

B Order of Eleventh Circuit Court of Appeals (On Petition for Rehearing and Suggestion of Rehearing In Banc), entered on September 15, 1989.....App. 3

C *Per curiam* order Eleventh Circuit Court of Appeals, entered on June 30, 1989.....App. 5

D Order Denying Motion for Rehearing, U.S. District Court (S.D. Fla.), entered on September 7, 1988..... App. 7

E "Order of Affirmance," U.S. District Court (S.D. Fla.), entered on June 30, 1988.....App. 9

F "Memorandum Decision On Amount Of Bank's Fees And Expenses," U.S. Bankruptcy Court (S.D. Fla.), entered on March 11, 1987.... App. 14

G "Memorandum Decision On Estate's Liability For Bank's Fees And Expenses," U.S. Bankruptcy Court (S.D. Fla.), entered on November 5, 1986.....App. 27

H "Confirmation Order," U.S. Bankruptcy Court (S.D. Fla.), entered on August 8, 1985.... App. 33

I Article IV, *Means For Execution Of The Plan*, Amended Consolidated Plan of Reorganization, filed on February 26, 1985 by the Bank of New York on behalf of the Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation.....App. 39

TABLE OF AUTHORITIES – Continued

Page

J Article III, *Classification Of Claims And Interests,* Amended Consolidated Plan of Reorganization, filed on February 26, 1985, by the Bank of New York on behalf of the Miami Center Limited Partnership, Chopin Associates, Miami Center Corporation, Theodore B. Gould, and Holywell Corporation.....App. 42

K "Memorandum Decision," U.S. Bankruptcy Court (S.D. Fla.), entered on June 24, 1985 in *The Bank of New York v. Olympia & York Florida Equity Corp., O&Y Equity Corp., Theodore B. Gould, Miami Center Joint Venture,* Adv. No. 85-0566-BKC-TCB.....App. 44

L "Memorandum Decision," U.S. Bankruptcy Court (S.D. Fla.), entered on September 27, 1985 in *Holywell Telecommunications Company and Holywell Leasing Company v. The Bank of New York,* Adv. No. 85-0906-BKC-TCB.....App. 52

M "Order On Emergency Motion To Treat Proceeds Of The Sale As Cash Collateral, To Segregate And Account For Cash Collateral," U.S. Bankruptcy Court (S.D. Fla.), entered on December 31, 1984.....App. 55

N "Final Judgment" (With "Findings Of Fact And Conclusions Of Law"), U.S. Bankruptcy Court (S.D. Fla.), entered on April 28, 1988.....App. 59

O Relevant Statutory Provisions.....App. 73

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5959

D.C. Docket No. 87-969

IN RE: HOLYWELL CORPORATION,

Debtor,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD,

Plaintiffs-Appellants,

versus

BANK OF NEW YORK,

Defendent-Appellee

Appeal from the United States District Court for the Southern District of Florida

---

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 30, 1989
For the Court: Miguel J. Cortez, Clerk
By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: SEP 20, 1989

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-5959

IN RE: HOLYWELL CORPORATION,

Debtor

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD,

Plaintiffs-Appellants

versus

BANK OF NEW YORK,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 30, 1989, 11 Cir., 1989, ___ F.2d ___).

(September 5, 1989)

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule (35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
–FOR THE ELEVENTH CIRCUIT

No. 88-5959

D.C. Docket No. 87-969

IN RE: HOLYWELL CORPORATION,

Debtor,

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES and THEODORE B. GOULD,

Plaintiffs-Appellants

versus

BANK OF NEW YORK,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 1989)

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

PER CURIAM:

This is an appeal from an order entered in the United States District Court, *Holywell Corp. v. Bank of New York,*

---

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

(S.D. Fla. June 30, 1988), affirming two orders of the Bankruptcy Court, *Memorandum Decision on Estate's Liability for Bank's Fees and Expenses*, 68 Bankr. 134 (S.D. Fla. 1986); and *Memorandum Decision on Amount of Bank's Fees and Expenses*, (Bankr. S.D. Fla. Mar. 11, 1987).

We affirm the judgment for the reasons stated in and based upon the above listed orders.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE HOLYWELL CORPORATION

_____/

HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Appellants,

v.

THE BANK OF NEW YORK,

Appellee.

_____/

CASE NO.: 87-0969-CIV-NESBITT

ORDER

(Filed Sep. 7, 1988)

THIS CAUSE is before the Court upon Appellants' Motion for Rehearing and Memorandum of Law, filed on July 13, 1988. After a review of the memoranda filed by counsel, the applicable law, and the Court file in this cause, it is

ORDERED AND ADJUDGED that said Motion be, and the same is hereby, DENIED.

DONE AND ORDERED in Chambers this 6th day of August 1988.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES DISTRICT
JUDGE

cc: counsel of record

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-0969-CIV-NESBITT

IN THE MATTER OF:

HOLYWELL CORPORATION, et al.,

Debtors.

ORDER
OF AFFIRMANCE
(Filed Jun 30, 1988)

_____/

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Appellants,

vs.

THE BANK OF NEW YORK,

Appellee.

_____/

This cause is before the Court upon an appeal taken from two order of the Bankruptcy Court, the Memorandum Decision on Estate's Liabilities for Bank's Fees and Expenses of November 5, 1987 ("the liability memorandum") and Memorandum Decision on Amount of Bank's Fees and Expenses of March 11, 1987 ("the fee award memorandum"). The Court has reviewed and duly considered the briefs filed by counsel, the relevant law, and heard oral arguments. The liability memorandum determined that the Bank of New York would be allowed a

general unsecured claim, subordinate to the claims of other general unsecured non-insiders, for the attorneys fees incurred in collection of loans to Holywell, including fees incurred in the bankruptcy proceedings. (The contractual right to the fees under applicable state law is not in dispute.)[1] This liability was predicated on 506(a),[2] which "separates an undersecured creditor's claim into two parts: He has a secured claim to the extent of the value of his collateral; *he has an unsecured claim for the balance of his claim.*" Notes of Committee on the Judiciary, Senate Report No. 95-989 (Emphasis added). The attorneys fees for collection of the debt are part of that claim. *LeLaurin v. Frost National Bank of San Antonio*, 391 F.2d 687 (5th Cir. ___), *cert. denied*, 393 U.S. 979 (1968).

---

[1] The Bank of New York argues briefly that it is in fact an over-secured creditor. *See* Order on Debtors' "Under Security Claim," December 18, 1987 (Weaver, J.). The Court is unaware to what extent the Bank of New York may be oversecured. As the fees and expenses may be allowed as secured claims only to the extent of the oversecurity, 11 U.S.C. 506 (1984), it is not known whether the claim for attorney's fees is within 506(b). However, the Memoranda decisions issued by Judge Britton treat the attorney's fees and expense claims as an unsecured claim. Accordingly, this Court will address the issue raised in the Appeal which treats the Claim as unsecured.

[2] The appellant Holywell Corporation contends that the Bankruptcy Court based the award on 506(b). This is incorrect. While the Bankruptcy Court prefaced the decision with the statement that 506(b) does not *preclude* an award of attorney's fees based on an unsecured claim, the decision itself is based upon 506(a).

The Bank of New York has an allowable claim[3] inasmuch as it is based on a contractual right under the loan documents signed by the parties. While the issue has not been squarely addressed in this circuit, numerous decisions exist in other circuits allowing such claims.[4] In *United Merchants and Manufacturers, Inc. v. Equitable Life Assurance Society of the United States*, 674 F.2d 134 (2d Cir. 1982), the Second Circuit stated:

> We cannot agree that the policy of equitable distribution renders an unsecured creditor's otherwise valid contractual claim for collection costs unenforceable in bankruptcy. . . . Moreover, the case law does not support a distinction between secured and unsecured creditors who seek to recover collection costs in bankruptcy. In *Security Mortgage Co. v. Powers*, 278 U.S. 149, 49 S.Ct. 84, 73 L.Ed. 236 (1928), Justice Brandeis wrote for the Court: "The character of the obligation to pay attorney's fees presents no obstacle to enforcing it in bankruptcy, *either as a provable claim* or by way of a lien upon specific property."

* * *

---

[3] Appellant argues that the Supreme Court decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 108 S. Ct. 626 (1988) holds that such awards are precluded under 11 U.S.C. § 506(b). However the context of that case is completely inapposite: that case states that an unsecured creditor is not entitled to interest as compensation for delay caused by the automatic stay under 11 U.S.C. § 362(d)(1).

[4] The cases cited by Appellant Holywell Corporation do not support their proposition: their cited cases merely address the issue of whether creditor seeking recovery under section 506(b) must be an oversecured creditor.

> UM&M asserts that the legislative history of section 506(b) indicates that the statute was intended to codify pre-Code law that only a secured creditor can assert a contractually-based right to recover collection costs. Brief for Appellees at 28-29. Section 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim,* its right to interest and costs arising under its credit agreement. . . .Neither the statute nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorney's fees. . . .Equitable and Hancock correctly respond, however, that their claims for collection costs are based in contract and are independent of statutory compensable administrative expenses for services rendered to the estate. As such, these claims are provable under section 63 of the Act.

Id at 137-38; *LeLaurin v. Frost National Bank of San Antonio,* 391 F.2d 687 (5th Cir. 1968) (allowing claim for reasonable attorney's fees). *See also In re Ladycliff College,* 56 Bankr. 756 (S.D.N.Y. 1985); *In re Ely,* 28 Bankr. 488 (Bankr. E.D. Tenn. 1983); *In re Tri-State Homes, Inc.* 56 Bankr. 24 (Bnkr. W.D. Wis. 1985); *In re Missionary Baptist Foundation of America,* 24 Bankr. 970 (N.D. Tex. 1982); *Matter of 268 Ltd.* 789 F.2d 674 (9th Cir. 1986); *In re Martin,* 761 F.2d 1163 (6th Cir. 1985); *Liberty Nat'l. Bank & Trust Co. v. George,* 70 Bankr. 312 (W.D. Ky. 1987).

The remaining issues raised by Holywell Corporation are similarly without merit. Accordingly, it is

ORDERED AND ADJUDGED that the above-stated Memoranda Decisions entered by the Bankruptcy Court are AFFIRMED.

DONE AND ORDERED at Miami, Dade County, Florida this 30th day of June 1988.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
U.S. DISTRICT JUDGE

cc: Counsel of Record

APPENDIX F

Exhibit B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

CASE NO. 84-01590-BKC-TCB
CHAPTER 11

MEMORANDUM DECISION ON AMOUNT OF BANK'S FEES AND EXPENSES

The Bank of New York, the largest creditor of these debtors, has applied for attorneys' fees in the amount of $1,300,991, plus attorneys' expenses of $229,434, together with prepetition expenses paid to Florida Power & Light and Turner Construction Co. in the amount of $325,033 (a total of $1,855,458). (C. P. No. 1281). The Bank seeks reimbursement for these sums, which it has already paid.

The application, which was heard initially on October 20, 1986, has been vigorously opposed by the Liquidating Trustee, the debtors' and a major creditor, Olympia & York.

This court's November 5 Memorandum Decision on Estate's Liability and Bank's Fees and Expenses (C. P. No. 1451) held that the Bank had waived any priority administrative claim it had under 11 U.S.C. §503(b)(3)(D) and (4) for its substantial contribution in the case, and had also waived any security for its claim, but that it still has a general, unsecured contractual claim under §506(a) for

these asserted collection fees and expenses. That Decision also recognized that the Bank, as the successful proponent of a reorganization plan confirmed by this court August 8, 1985, had voluntarily subordinated its unsecured contractual claim to the claims of all other general, unsecured non-insider claims.

All other general, unsecured non-insider claims have been paid or provided for in full and it presently appears probable, though not yet certain, that there will be ample assets to pay this claim of the Bank in full though not enough to also completely satisfy the insider claims.

The November Memorandum Decision did not resolve the amount of the Bank's permissible claim. A further hearing was held November 20, 1986 for that purpose. Detailed memoranda from the Liquidating Trustee (C.P. No. 1494a) and the Bank (C. P. No. 1532a and b) are now before me addressing that issue. The liquidating Trustee has recommended that the Bank's claim be reduced to $319,550.

I find and conclude that the Bank's allowable general, unsecured and subordinated claim includes the $325,032 it paid Turner Construction and Florida Power & Light as well as $1,126,824 in fees together with a part of its attorneys' expenses. The amount of the allowable expenses remains to be determined by the Trustee in accordance with this Decision. No part of the foregoing allowed claims was satisfied or released in the Trustee's conveyance in October 1985 of the Miami Center to the Bank's nominee.

The contractual predicates for this claim are the loan documents covering the $240 million principle and interest owed the Bank by the debtors. Though not identical, these notes provide in essence for reimbursement of all reasonable fees and expenses incurred by the Bank in obtaining "collection" of the indebtedness. New York law is controlling in the interpretation of these contractual provisions. However, no party has identified any New York statute or precedent which would depart from the general principles identified and followed in Florida or in the federal decisions passing upon the reasonableness of fees and expenses, most recently *Blum v. Stenson*, 465 U.S. 886 (1984) and *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The debtors defaulted in February 1984. The commencement of a Florida foreclosure action in July prompted these bankruptcy petitions, filed in August 1984, which stayed the foreclosure. In order to preserve the value of its collateral (the partially uncompleted and largely unoccupied Miami Center complex, a luxury hotel and office building in the heart of Miami), the Bank was forced to advance funds to offset operating deficits, actively supervise the debtors' operations, and present and win support for a chapter 11 plan. It faced determined and constant opposition of the debtors as well as some creditors. It accomplished its objectives with unusual dispatch, obtaining confirmation of its plan in August 1985. As a result the bank has recovered almost all of its total claim, losing only its default interest increment. Had it not been successful in these bankruptcies, it faced a substantial loss of its principal as well as all interest. Neither the debtors nor any other party had the means or the ability to untangle the mess brought to this

court by the debtors. The Bank's counsel did all that could have been asked of them and they did it well.

The Advances to Turner and Florida Power & Light

I agree with the Bank that, under the circumstances of this case, the $186,796 advanced to Turner Construction to complete construction and the $138,236 paid to Florida Power & Light for the Center's June 1984 power bill were expenses essential to the protection of the Bank's collateral and, therefore, recoverable as a part of this claim. If ¶1:08(a) of the $89.5 million mortgage does not expressly so provide (and I believe it does), this expensive is impliedly covered. These obligations were separately and specifically acknowledged and approved by the debtors when they were made by the Bank.

Attorneys' Fees

The rest of the Bank's activity, which I have summarized above, was the work of its attorneys. The trustee argues that most of these services were not "collection" expenses and, therefore, are not contractually recoverable after the stay of foreclosure. When the debtors stopped the foreclosure by filing these chapter 11 bankruptcies, most of the challenged legal services became essential to the collection of the debt. I find that, with the exception of the Bank's "ownership" legal services and duplicated services discussed below, each was a collection expense and falls within the contractual provision.

The Bank concedes that $466,926 of the Attorneys' fees it has paid the applicants were for "ownership services" and are not recoverable. I accept the applicants' account of these non-recoverable fees and have deducted them.

The Bank also concedes that there was significant duplication in the legal services it received. In its initial application, the Bank estimated the unnecessary duplication at "approximately" $700,000, at the same time it underestimated its ownership services at $300,000. (C.P. No. 1281 at p. 6). It has also underestimated the degree of duplication, which I fix at $1,174,412.

The Bank was served by the New York law firm which had represented the Bank for 150 years, by Miami attorney without bankruptcy expertise but who had previously handled a number of matters in Miami for the Bank, and by another Miami firm with bankruptcy expertise. It is understandable that the Bank turned to each of these attorneys for guidance and help, and some participation and oversight by the first two is also understandable and reasonable. However, the prodigious involvement and consequent duplication evident here, caused largely by the involvement of the first two attorneys in the handling of the bankruptcy case, was neither necessary nor reasonable. It forms the primary basis for the three objections to the Bank's requested reimbursement from the bankruptcy estate.

The trustee's analysis is that 90% of the New York firm's time slips before October 1985 and 80% afterwards include telephone calls or conferences with one or both other firms, and that 79% of the non-bankruptcy Miami

firms' and 55% of the Miami bankruptcy specialist's time slips contained similar entries.

Both the first and second Miami attorneys engaged by the Bank were completely qualified and equipped to handle the foreclosure and provide all legal services incident to collection of the Bank's claim, both before and after the foreclosure filing, until the debtors filed for bankruptcy. The necessary and reasonable participation by the New York firm, which could not institute foreclosure, and by more than one Miami firm during this phase was nominal.

The Miami firm engaged for its bankruptcy expertise is one of the oldest in Florida, is amply staffed with well-qualified attorneys and enjoys an outstanding reputation not only in bankruptcy but in the rest of its general civil practice. After the filing of bankruptcy and its engagement to represent the Bank in the bankruptcy, the necessary and reasonable participation by the other two firms became minimal.

If the Bank preferred the comfort of consultive participation by more than one firm for each of the two distinct phases involved in the collection of its claim, it had every right to purchase such comfort. It is not, however, entitled to recover that additional cost from this estate at the expense of the other claimants.

As was noted in *In re United States Merchants and Manufacturers, Inc. v. Equitable Life Assurance Soc'y of the United States*, 674 F.2d 134, 139 (2nd Cir. 1982):

> "[A] rule of reason must be observed, in order to avoid such clauses [for the recovery by secured creditors of their collection expenses] becoming

> a tool for wasteful diversion of an estate at the hands of secured creditors, who, knowing that the estate must foot the bills, fail to exercise restraint in enforcement expenses."

In this case, as is frequently the case, it was not predictable from the outset that the Bank would ultimately recover all its principal, as well as its interest and expenses. However, if the Bank and its counsel appreciated this fact, I believe both exercised less restraint in providing and paying for these services then they would have if there had been no contractual basis for reimbursement.

The Bank does not dispute the trustee's tally of time slips where the Bank's attorneys talked to each other, but disputes the trustee's exclusion of all these time slips. A precise count of the actual time spent in unreasonable duplication is prevented here because the applicants frequently included other services in the same time charge without a breakdown, and some degree of supervision and coordination was reasonable. From my review of these charges, I estimate and find that two-thirds of the percentages calculated by the trustee should be deducted as unnecessary duplication. It is the Bank's burden to justify its application. B.R. 2016(a); *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1299 (5th Cir. 1977); 2 *Collier on Bankruptcy* ¶330.05[2][b] n. 19 (15th ed. 1986). If the remaining third does not fairly cover the time spend upon activities other than consultation and the consultation time was reasonably spent with respect to facets of the representation which lie along the boundaries of the special expertise and responsibility of the three firms, the

Bank must bear the consequences of its incomplete documentation.

Through oversight, the Bank's original application (C.P. No. 1281) omitted eight months' charged before February 1, 1984, and it also contained a major mathematical error in the computation of attorneys' fees. I have accepted the Bank's corrected figures (an increase of $467, 174 or 20%) on the premise, as it represents, that it made these corrected figures available to the three objecting parties "months in advance of November 1986 hearing". Of course, neither error was deliberate.

I agree with the trustee that the original narrative description of the services provided (except that given by Steel, Hector) was woefully inadequate and, even as supplemented in January (C. P. No. 1532a), leaves much to be desired. I have, however, accepted the belated explanations filed by the Bank in response to the trustee's objections.

The trustee has properly noted the gross discrepancies between earlier figures given the court by the Bank as to its litigation expenses and its present figures. These discrepancies resulted, I believe, from inadequate record-keeping and carelessness on the part of Mr. Noone's and Mr. Ziegler's firms which may not have anticipated bankruptcy or the degree of scrutiny fee applications receive in bankruptcy. There was no intent to deceive anyone and these discrepancies did not prejudice any party. They do

not now warrant rejection of any part of the Bank's claim.[1]

The trustee argues that time spent by the Bank in defending appeals and in litigation involving non-bankrupt subsidiaries of the debtors ought not to be included in the recoverable collection expenses. I disagree. The Bank's appellate expenses were essential in collecting its account. Similarly, it become necessary in this case for the Bank to pursue the assets of non-bankrupt subsidiaries owned by the debtors and, therefore, assets subject to disposition under the Bank's plan. No party has shown me that New York law requires the exclusion of either of these expenses.

I also reject the trustee's contention that fees paid since the fall of 1985 by a different entity, M.C. Holdings Partners, should not be considered for reimbursement. In their purchase from the trustee, the Bank and the institutional lenders who participated in the Bank's loan elected to take title to the Miami Center property through a land trust under that name. The participants and the percentage participation remained identical. The change was one of form, not substance, and there is no basis to now disqualify reimbursement of the fees paid by the Bank's successor in interest.

I find, therefore, that the attorneys' fees recoverable by the Bank total $1,126,824. To assist the parties in

---

[1] The Bank's commitment with respect to its maximum prepetition collection expenses ($831,563) noted in the March 20, 1985 judgment determining the amount of its lien is binding upon the Bank. However, that sum exceeds the reimbursement approved by this court.

verifying the calculations which have resulted in this finding, I attached a schedule entitled Attorneys' Fees Adjustments reflecting and explaining those calculations.

Attorney's Expenses

The Bank also seeks reimbursement for the expenses it has paid its lawyers ($229,434). Many of the items billed for have already been considered by me as part of the attorney's normal overhead in accepting the hourly billing rates charged by these firms. These items include internal charges, as distinct from expenses paid to others in arms-length transactions; charges for services traditionally provided by attorneys or their secretaries, such as legal research and the preparation of documents and extra copies; and supplemental payments made to the firm's staff; as well as all "miscellaneous" charges. They are denied reimbursement as costs or expenses. *Matter of Interstate Stores, Inc.*, 437 F.Supp. 14, 17 (S.D.N.Y 1977); *Matter of Tom Moore Distillery Co.*, 52 F.Supp. 938 (W.D.Ky. 1943); *Matter of National Radiator Co.*, 29 F.Supp. 804 (W.D.Pa. 1939); *Watters v. Hamilton Gas Co.* 29 F.Supp. 436 (S.D.W.Va. 1939), *aff'd*, Ill F.2d 100 (4th Cir. 1940); *Matter of Mercantile Arcade Realty Corp.*, 20 F.Supp. 397 (S.D.Cal. 1937).

I have found no explanation or justification for the "costs advanced" billings by Meyer, Weiss (Mr. Ziegler's former firm) of September 6, 1984 through June 3, 1985. The billings refer to "itemized cost statements" which are not in this record. These unexplained charges must also be denied.

The trustee's counsel is to (a) deduct from the billings of all the Bank's attorneys reproduction and photocopy charges unless paid to third parties, computer research including Mead Data and Lexis charges, word processing charges, overtime pay, meals, carfare, local travel and parking expense, conference lunches and dinners, lost luggage replacement, postage, and all miscellaneous charges – whether standing alone or lumped with other items – as well as all similar charges; (b) deduct the Meyer, Weiss "costs advanced" identified above, unless the "itemized costs statements" are now in this record; and (c) multiply each of the resulting net charges by the percentage figures in the fifth column of the attached schedule of Attorneys' Fees Adjustments. This multiplication restricts recovery to those expenses attributable to reimbursable legal services, accepting the Bank's suggestion that expenses be prorated in this manner. (C. P. No. 1532a, Noone Affidavit ¶ 3).

I further request that trustee's counsel submit an Order, in accordance with this Memorandum Decision, directing the trustee to pay jointly to the Bank and M. C. Holdings Partners the total figure resulting from the calculations directed in the preceding paragraph, plus the $325,032 paid by the Bank to Turner and Florida Power & Light, and plus the $1,126,824 which I have found to be the reimbursable attorney's fees.

It is possible that the Bank will incur some further legal expense incident to this case. However, it elected not to estimate and anticipate that expense in this final application. These bankruptcies should be concluded and that requires finality in the consideration of this claim. No further application from the Bank will be considered.

DONE and ORDERED in Miami, Florida this 11th day of March, 1987.

/s/ Thomas C. Britton
Thomas C. Britton
Chief Bankruptcy Judge

Copies to:

Attorney for Debtors
Betsy C. Cox, Esquire
CARLTON, FIELDS, et al.
1400 Florida National Bank Bldg.
225 Water Street
Jacksonville, FL 32202-4486

Attorney for Liquidating Trustee
Irving M. Wolff, Esquire
HOLLAND & KNIGHT
1200 Brickell Avenue
P. O. Box 015441
Miami, FL 33101

ATTORNEYS' FEES ADJUSTMENTS

	Billed to Bank[1]	Ownership[2] Services	Duplication[3] Adjustment	Recoverable[4] Fee	Recoverable as Percent of Total[5] Billed to Bank
		(Services from 6-9-83 to 10-10-85)			
Noone	$1,192,641	$167,625	$615,009	$ 410,006	34.4%
Salter	533,574	17,823	189,280	326,471	61.2%
Ziegler	316,808	7,308	163,106	146,394	46.2%
		(Services from 10-11-85 to 4-30-86)			
Noone	$ 373,455	$200,365	$ 92,256	$ 80,834	21.6%
Salter	264,339	66,330	72,669	125,340	47.4%
Ziegler	87,346	7,475	42,092	37,779	43.2%
			Total Recoverable Fees	$1,126,824	

[1] Noone Affidavit ¶3.

[2] Noone Affidavit ¶4 and Exhibits C & D.

[3] Percentage of time entries reflecting interfirm calls and conferences (per trustee memo pp. 7-14) times two-thirds times total billed to bank less ownership services.

[4] Total billed to bank less ownership services and duplication adjustment.

[5] Recoverable fee divided by total billed to bank. To be used in allocation of expenses.

APPENDIX G

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)	CASE NO. 84-01590-BKC-TCB
HOLYWELL CORPORATION, ET AL.,	)	CHAPTER 11
Debtors.	)	

MEMORANDUM DECISION ON ESTATE'S LIABILITY FOR BANK'S FEES AND EXPENSES

(Filed Nov. 6, 1986)

The Bank of New York, the largest creditor of these debtors, has applied for attorneys' fees in the amount of $1,300,991, plus attorneys' expenses of $229,434, together with prepetition expenses paid to Florida Power & Light and Turner Construction Co. in the amount of $325,033 (a total of $1,855,458). (C. P. No. 1281). The Bank seeks reimbursement for these sums, which it has already paid. It was heard on October 20.

The application has been vigorously opposed by the Liquidating Trustee (C. P. No. 1418), the debtors (C. P. No. 1430) and Olympia & York (C. P. No. 1427). Because the objections raised serious question as to whether the Bank's claim had been waived or was time-barred, the application was taken under advisement for a determination of the estate's *liability* with respect to this application, reserving to a further hearing and a separate order

the *amount* of that liability in the event that the estate remains liable for any part of the application.

I conclude that the Bank has waived any claim it had under 11 U.S.C. § 503(b) (3) (D) or (4), which provides priority administrative claims for creditors who make a substantial contribution in a reorganization case. I also conclude that the Bank has waived any secured status for any part of this claim for which it has not yet already received credit during the sale that was closed on October 10, 1985. However, I agree with the Bank that its unsecured contractual claim, which it has voluntarily agreed to subordinate to the full payment of Classes 1 through 6 of the confirmed plan, is properly before the court and requires a further hearing for the determination of the amount of that claim.

The Bank's application is asserted, alternatively, as a contractual claim under § 506 and as an administrative claim under § 503(b).

Contractual Claim § 506

On March 20, 1985, in Adversary Proceeding No. 85-0160, the amount and priority of the Bank's lien against the Miami Center property was fixed in a judgment that has become final, reserving only the question whether the Bank's *prepetition* legal and loan expenses (which the Bank by stipulation limited to $831,563) were allowable as part of the lien. That issue was never brought forward by the Bank and, therefore, was never resolved before the October 10, 1985 closing that occurred pursuant to the confirmed plan. At that closing, the Liquidating Trustee conveyed the Miami Center to the

Bank's nominee, giving the Bank full credit for its lien. It is not clear to me whether the Bank received credit for the $831,563 or not, which could bear upon the amount recoverable by the Bank. That point may be clarified at the subsequent hearing.

In the contract of sale executed between the Liquidating Trustee and the Bank at the closing, it was stipulated between these two parties that the closing neither precluded nor prohibited the Bank from seeking and obtaining allowance by the court of its expenses and fees after payment of Classes 1 through 6 inclusive, notwithstanding the fact that the Bank was entitled to a Class 2 priority. In effect, the Bank acknowledged that its claim was a general unsecured claim which it consented to subordinate to the claims of other general unsecured non-insider claims. It did so because commitments had been made to those creditors that they would be paid first.

The objectors argue that the October 10, 1985 closing precludes any further consideration of the Bank's contractual claim predicated upon the provisions in the debtors' notes and mortgages. The notes and mortgages provide in various forms for reimbursement of the reasonable expenses incurred by the Bank in the collection of its debt. I agree that the Bank has lost its opportunity to assert any further *secured* status for this contractual claim because its collateral, the Miami Center property, has now passed from the control of this court and I see no reasonable predicate for the Bank to claim that the real property remains subject to the Bank's unliquidated contractual claim.

I disagree, however, with the objectors that the foregoing circumstances extinguish the Bank's *unsecured* contractual claim. Although § 506 does not expressly preserve an unsecured claim, it does not foreclose one. I see no reason to presume that the unsecured claim is barred simply because it exceeds the value of the pledge collateral. 3 *Collier on Bankruptcy* ¶506.05 n. 5 (15th Ed. 1986).

The Bank's timely claims 228 through 232 which were filed in this case expressly asserted its claim for attorneys' fees and costs. Those claims remain subject to consideration by the court as unsecured claims. § 502(j).

Administrative Claim § 503(b)

By an Order dated September 27, 1985 (C. P. No. 1014), all administrative claims were required to be filed not later than October 17, 1985. The Bank's only response to that Order was a motion filed October 17 (C. P. No. 10[illegible]) for a hearing to determine its legal and loan expenses pursuant to the judgment of March 20, 1985, which has been discussed above. In that motion, the Bank took notice of the Order of September 27 and correctly noted that the Order related to Class 1 administrative claims under § 503(b). The motion stated:

> The Bank's claims for legal and loan expenses are not sought to be allowed as Class 1 administrative claims, but rather as recoverable expenses under the Bank's lien documents (after payment of all class 1 through Class 6 claims). The Final Judgment of March 20, 1985 reserved ruling in respect to such expenses.

The motion further recited that:

> Since the claims are not Class 1 administrative claims, the Bank's request for a hearing will not delay or impede (a) the Class 1 fee applications to be heard on October 21, 1985, or (b) the payment of undisputed Class 1 through Class 6 claims pursuant to the Plan.

This motion, which was unopposed, was granted (C. P. No. 1072) and the Bank was directed to file an application and set a hearing.

The objectors argue that in the foregoing motion the Bank unambiguously waived its right to assert an administrative claim under § 503(b) and elected to assert only its contractual claim, acknowledging its previous consent to subordination of that contractual claim. The objectors also argue that the Bank's administrative claim, asserted for the first time in the instant application filed June 13, 1986 is time-barred by the Order of September 27, 1985. I agree with the objectors in both respects.

The Bank's only response is the suggestion that because there is no statutory provision nor any rule which imposes a deadline for the filing of administrative claims under § 503, such claims may be filed at any time. By inference, the Bank argues that the court lacks authority to impose a deadline as was done in this instance. The Order was clearly within the court's reasonable discretion under § 105(a). It is essential that administrative claims, which are entitled to first priority in a bankruptcy distribution, be established with finality before any distribution may be made to any subordinate classes of creditors. This deadline was fixed, without objection from any party, to coincide with the distribution provided under

the confirmed plan. Its establishment in this case was necessary, reasonable and authorized by § 105(a).

As has already been noted, the rejection of the Bank's alternative theory belatedly asserted under § 503(b) is consistent with the Bank's previous position and the Bank's consent to subordinate its fees and expenses to the Class 1 through 6 claims. The rejection of this alternative theory has no effect on the Bank's contractual claim, other than a possible effect on the amount allowable, a consideration which must await a further hearing.

A further hearing on the Bank's application will be held on Thursday, November 20, 1986 at 9:30 a.m. in Courtroom 1406 at 51 SW 1st Avenue, Miami, Florida, to hear the parties with respect to the *amount* of the Bank's claim.

I have deliberately entered this Memorandum Decision without an accompanying order because I intend that there be a single, final appealable order upon the Bank's application, which includes the fixing of the amount of that claim. The review of that final order would reach the issues discussed in this Memorandum Decision. My purpose, obviously, is to avoid the inconvenience and confusion that could result from two appealable orders which might be assigned to different District Court judges for review.

DONE and ORDERED in Miami, Florida this 5th day of November, 1986.

/s/ Thomas C. Britton
Thomas C. Britton
Chief Bankruptcy Judge

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case. No. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-ACB
84-01594-BKC-TCB

IN RE: HOLYWELL CORPORATION, *et al.*,
Debtor(s).

CONFIRMATION ORDER

These five chapter 11 debtors are owned, controlled and dominated by the individual debtor, Theodore B. Gould. On February 15, the debtors filed separate, but identical plans. Eleven days later, the Bank of New York, the major creditor whose claim is undersecured and hopelessly in default, filed an alternative plan. The competing plans were submitted simultaneously to the creditors for their separate acceptance or rejection and a joint confirmation hearing was held on April 29. Although conventional wisdom under the previous Act has been that creditors cannot be relied upon to understand and vote upon more than one plan at a time, the simultaneous submission of competing plans is clearly authorized. 11 U.S.C. § 1129(c); B.R. 3018(c). I am convinced that the risk of confusion was acceptable in this instance.

All parties are agreed that the debtors' assets, principally a major office building and luxury hotel in downtown Miami must be liquidated and the sooner the better.

The bank's plan rests upon a firm commitment by the bank to purchase the property for $255.6 million. The debtors' plans are based upon a "contract" to sell the property to an individual, Hadid, for a substantially higher price. However, there is no binding commitment from Hadid, who in effect has an option for which he paid nothing. The debtors have been in this court for nearly a year and have, so far, been unable to produce a firm contract at any price.

The competing plans differ significantly in their respective classification and treatment of creditors.

Because of the continuing and rapid escalation of the debtor's debt, this case could not tolerate the delay which would be caused by a separate and consecutive consideration of these competing proposals. In retrospect, there has been no indication that the creditors were befuddled by the simultaneous submission of the alternative plans.

By an overwhelming margin, the creditors (measured by the dollar amount of their claims) have demonstrated a preference for the bank's plan. The percentage of creditors who voted to *reject* each plan with respect to each of the five debtors was as follows:

	Debtors' Plans	BONY Plan
Holywell	97% Rejection	15% Rejection
MCLP	80% "	10% "
MC Corp.	99% "	10% "
Chopin	99% "	0.1% "
Gould	80% "	12% "

Each of the creditor's committees have elected to support the bank's plan.

The substantial sums involved coupled with the simultaneous consideration of competing plans have resulted in spirited litigation between the two camps on a number of issues. The circumstances do not require and time simply does not permit a review and discussion of all these issues in this order. If this court had permitted the attorneys to do so, the charges, countercharges, law suits, briefs and oral arguments with respect to these issues would almost certainly continue until the last available penny had been spent to pay counsel. If the creditors are to salvage anything from these cases, they must be resolved as rapidly as the law permits in order that the assets may be liquidated and the continuing losses may be ended.

The principal support for the debtors' plans and, therefore, the major attack on the bank's plan comes from Gould and Olympia & York Florida Equity Corp. O. & Y. leased virtually all the furniture, fixtures and equipment required for the two large buildings. It has never received any payment. The bank has contended that the leases were not "true leases" but instead were unperfected financing agreements. By a judgment entered in an adversary proceeding on July 17, 1985, I rejected the bank's contention and agreed with O. & Y. The bank has appealed that decision and has filed a Second Amendment to Plan (C. P. No. 854) by which it in effect guarantees payment in full of the O. & Y. claim of $14.4 million, if the bank is unable to obtain a reversal of my decision.

The bank's plan subordinates the O. & Y. claim to the payment of all other unaffiliated creditors. By this order, I am approving that classification. O. & Y. will surely seek review. The bank's Second Amendment to its plan assures

the funding necessary to pay the claim in the event my decision with respect to subordination is reversed.

The remaining issues between the bank, on the one hand, and O. & Y. and the debtor MCLP (of which O. & Y. is, with Gould, a joint general partner) do not merit further elaboration here.

The debtor's major contention has been that the assets are worth substantially more than the bank has offered to pay. The only way to be certain with respect to this issue is to delay liquidation as long as Gould requests. If I did so and if he produced no more tangible results during the next year than he did in the past year, virtually every creditor except the bank would be wiped out and the substantial loss now faced by the bank would become a blood bath. To me, the decision appears clear.

Gould's other major criticism of the bank's plan is its provision for a modified form of substantive consolidation proposed by the plan and approved by me in an order entered on July 23. (C.P. No. 840). There is a pending application for rehearing and reconsideration of that order. No new points are raised and rehearing is denied. The issue was aired at great lengths and no purpose would be served by a repetition here of the analysis and comments made by the court, on the record at the end of that hearing.

Gould's remaining contentions do not, I think, require discussion.

During the confirmation process, the bank entered into a stipulation with a creditors' committee on April 29.

(C. P. No. 614). There was an addendum to that stipulation on the same day. (C. P. No. 564). A second addendum was agreed upon on May 30 (C. P. No. 709(c)), and a third addendum was agreed upon on July 30. (C. P. No. 855) That stipulation as modified is approved.

I find that the Amended Plan (C. P. No. 478) filed March 26 by the Bank of New York as modified by the Second Amendment (C. P. No. 854) filed July 30 meets each of the requirements specified in 11 U.S.C. § 1129(a) and (b). The bank has invoked (C. P. No. 546) the cram down provisions of § 1129(b) (1). They are justified in this instance because the plan as amended does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under, and has not accepted, the bank's plan. That plan, as amended, is confirmed.

The several plans filed by the debtors do not meet the foregoing statutory requirements. They have been rejected by the creditors and confirmation is denied with respect to each of the debtor's plans.

DONE and ORDERED at Miami, Florida, this 8th day of August, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esquire
John Kozyak, Esquire
Scott D. Sheftall, Esquire
Irving Wolff, Esquire
Thomas F. Noone, Esquire
Joel Aresty, Esquire
All Committees
Vance Salter, Esquire
All creditors

APPENDIX I

IV. *MEANS FOR EXECUTION OF THE PLAN*

Sale of Miami Center

The plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date.

The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. The Trustee shall be required to: (i) pay (if requested by BNY, under protest) from such cash the real estate taxes for 1983 and 1984, and pay the Debtors' pro rata portion of the real estate taxes for 1985 due to the Miami Center Closing Date.

(ii) pay (if requested by BNY, under protest) from such cash the Personal Property Taxes for 1983 and 1984, and pay the Debtor's pro rata portion of the personal property taxes for 1985 due to the Miami Center Closing Date.

(iii) take all steps and to make all payments, from such cash (and, if necessary, from the Washington Proceeds) to exercise the purchase

option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E Leases.

Title to Miami Center would be delivered to BNY or its designee by the Trustee free and clear of all leases, liens, encumbrances and contracts affecting Miami Center, except those set forth on Exhibit B attached hereto, and except as provided in Article XI hereof. At the closing BNY or its designee would receive fee title to the FF&E covered by the Gould FF&E Leases, as a result of the merger of such leases effected by the substantive consolidation of the estates (or Gould, any of the Debtors, or the Trustee would cause any of the Gould Entities that are Lessors under the Gould FF&E Leases to convey directly to MCLP the FF&E covered by such Leases) and would receive fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date. On the Effective Date all other liens and encumbrances, including the mechanics liens and judgment liens on Miami Center are transferred and shall attach to the Trust Property, including the Washington Proceeds, subject to the security interests of BNY securing the BNY Holywell Loan. All contracts affecting Miami Center that are not to be assumed will be rejected in accordance with Article XI hereof. Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors.

BNY may elect to retain its mortgages on and security interests in Miami Center after the passing of title;

however, upon the passing of title, the personal liability of the Debtors on the obligations that are secured by such mortgages and security interests shall be released.

APPENDIX J

III. *CLASSIFICATION OF CLAIMS AND INTERESTS*

For the purposes of distribution under this Plan, Claims and Secured Claims of all Debtors are divided into the following classes:

Class 1 - Administration Claims as the same are allowed and ordered paid by the Court.

Class 2 - The Secured Claim of BNY for the BNY-Debt, including interest at the pre-default contract rate to February 1, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 3 - The Secured Claim of BNY for the BNY Holywell Loan including interest at the pre-default contract rate to August 31, 1984 and at the post-default contract rate thereafter, attorneys' fees, costs and expenses, as provided in the documents evidencing such claims and as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 4 - All Secured Claims other than the BNY Debt and the BNY Holywell Loan, including interest at the rate of 10% per annum and attorneys' fees, as authorized under applicable law, as the same are allowed and ordered paid by the Court.

Class 5 - All Claims which are entitled to priority under Code §507 as the same are allowed, approved and ordered paid by the Court, including claims for wages, salaries and commissions entitled to priority under §507(a)(3) and tax claims of governmental units

entitled to priority made §506 and §507(a)(6), and including interest on such Claims as authorized by applicable law and allowed any ordered paid by the Court.

Class 6 - The Claims of all general unsecured creditors, excluding claims of Affiliated Creditors, and excluding the MCJV Claim and the O&Y Claim.

Class 7 - The MCJV Claim and the O&Y Claim.

Class 8 - The Claims of Affiliated Creditors.

Class 9 - The interest of the Debtors which remain after consummation of this Plan.

APPENDIX K

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 84-01590-BKC-TCB

IN RE: HOLYWELL CORP., *et al.*

Debtor(s).

Adv. No. 85-0566-BKC-TCB-A

THE BANK OF NEW YORK

Plaintiff,

v.

OLYMPIA & YORK FLORIDA EQUITY CORP.
O & Y EQUITY CORP., THEODORE B. GOULD,
MIAMI CENTER JOINT VENTURE

Defendants.

MEMORANDUM DECISION

The issue here is whether two agreements executed in May 1981, in which Miami Center Joint Venture leased certain personal property to Miami Center Limited Partnership are "true leases" or are in effect conditional sales

and therefore "leases intended as security". I concluded that they are true leases.

The personal property is furnishings, fixtures and equipment that were purchases to equip a hotel in Miami. The building is owned and operated by the lessee which is a chapter 11 debtor in this court. The leased personal property cost $7.8 million.

The lessor joint venture was formed two months before the lease. Its two general partners are T. B. Gould, another chapter 11 debtor in this court, and Olympia and York Florida Equity Corporation (O & Y), which loaned the lessor the $7.8 million that funded the purchase of the equipment. These two partners have been constantly at each other's throat in various courts since shortly after the leases were executed, but they are on the same side here.

Gould is not only of the general partners of the lessor joint venture, he also controls three other related chapter 11 debtors in this court.

The plaintiff bank was the construction lender for the hotel and office buildings. It is owed $50 million on its mortgage and is the largest creditor of the five related debtors which are dominated by Gould. Its chapter 11 plan to liquidate these five debtors' assets and distribute the proceeds is presently under consideration by this court along with competing plans presented by Gould.

The bank seeks a determination that the two leases are not true leases. The four defendants urge the contrary. The matter was tried on May 30.

If the leases are "true leases", the leases will be "assumed" under 11 U.S.C. § 365 under each of the competing plans. If reorganization fails, a liquidating trustee will also, as a practical matter, require the leased equipment. Assumption requires that the lease defaults be promptly cured. The accrued, unpaid rent to date is between $6.1 and $13 million depending on when the leases commenced, a disputed point not yet addressed by the parties. If the leases are found to be "true leases", no one would receive a windfall or gain any other inequitable advantage.

If on the other hand, the two leases are not "true leases," as the bank argues, the bank will come out of reorganization at least $10 million ahead of what it stands to recover if the two leases are given effect. This would be a complete windfall for the bank. The principal loser will be O & Y, which provided the purchase money for the equipment. No rent has ever been paid on the leases. O & Y's only recourse is against the lessor, which would lose title to the equipment and would itself become the holder of a worthless claim against the lessee for an unperfected security interest. Similarly, O & Y's claim against the lessor would be a claim as an insider, which would be behind all the claims of other creditors. O & Y's claim would be rendered virtually worthless.

The predicate for the bank's contention is UCC § 1-201(37), *Fla. Stat.* § 671.201(37):

> "(37) 'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation . . . Unless a lease or consignment is intended as security, reservation of title thereunder is not a security interest, but a consignment is in any event subject to the provisions on consignment sales

> (s.672.326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security."

A "security interest" if not perfected becomes unenforceable against the lessee here, which is a chapter 11 debtor-in-possession. 11 U.S.C. § 1107(a). These leases expressly prohibited the assertion of perfection of any security interest against the lessee.

The leases were executed for each party by Gould in his capacity as general partner of each entity. He denies any intention to create anything other than a true lease. It is undisputed that Metropolitan Life, the prospective permanent lender for the buildings, insisted that the equipment be leased and there be no perfected security interest against the property. It also reviewed and approved the leases, as did the plaintiff bank, before they were executed. Metropolitan's motives do not appear in this record. It has not been suggested that Gould had anything to gain by leasing the equipment rather than by purchasing it with borrowed funds collateralized by the equipment. I am satisfied that his only motive was to satisfy Metropolitan.

Until this action was filed six weeks ago, no one has suggested that the leases are not true leases any time during the four years they have been in existence. Indeed, the bank's disclosure statement supporting its

plan describes and treats the leases as leases, not as disguised conditional sales.

Neither the history nor the form of the documents, the direct testimony of the parties as to their intent, nor the contemporaneous acts of the parties support the bank's contention that the parties intended a conditional sale rather than a true lease. It is the bank's argument that the terms of the leases compel the conclusion that the parties in fact intended a conditional sale.

In *American Standard Credit Inc. v. National Cement Co.*, 643 F.2d 248, 261 (5th Cir. 1981) the court noted that the question whether particular transactions are "true leases" or "leases intended as security" is one of the most hotly litigated topics in commercial law, that there is considerable conflict among the various jurisdictions, and that federal courts are bound to apply the interpretations of the applicable State court "insofar as such interpretation may be discerned." It dealt with an Alabama lease.

Florida law is controlling here and the only reported case from a Florida court is *U. C. Leasing, Inc. v. Barnett Bank of West Florida*, 443 So.2d 384 (Fla. Dist. Ct. App. 1983). This decision affirmed a trial court's holding that a bank's perfected security interest in certain equipment was superior to a purported lessor's claim which had not been recorded as a security agreement. The trial court found the equipment lease to be not a "true lease" but rather a "secured transaction."

In this reported decision, neither the lessor nor the bank stood to gain a windfall. Each was the innocent victim of a merchant who executed separate inconsistent

agreements, first to lease from the lessor then to pledge the leased equipment to the bank for a loan.

Neither this decision nor any I have seen applied UCC § 1-201(37) where the result is to give one party a windfall at the expense of an innocent party. The legislative purpose was to protect the lessee's other creditors from fraud and deception. There is nothing in the record before me that suggests that anyone was misled or deceived by the leases in question here. Certainly the bank was not misled or deceived in anyway.

UCC § 1-102(1), *Fla. Stat.* § 671.102(1), requires that:

> "This code shall be liberally construed and applied to promote its underlying purpose and policies."

To construe and apply the code to produce the result urged here by the bank would defeat the purpose and policy of the code. It is a shield, not a sword.

Furthermore, the Florida court identified features of the transaction before it which promoted its conclusion, at least four of which are absent in out case.

1. There, the option price given the lessee to acquire title was "nominal" about 10% of the initial price. In our case the option price is the *greater of the unrecovered original cost or the market value* at the time the option is exercised. The only evidence of market value is an appraisal eight months ago of $7.7 million, 99% of the purchase price. I find that plaintiff has failed to carry its burden of showing that the option price would be "nominal" at any time during the 60-month life of these leases.

2. There, the initial payments, monthly payments, and option prices were readily equated to the current rate

of interest and the lessor admitted that the payments were determined by the related to the cost of funds and interest rates. Of course, every lessor must consider and try to recoup its investment, but in our case, there was no down payment, no such congruency, and no such admission as was before the Florida court. We have two leases executed on the same day involving the same kind of property, but which produce two different rates of return for the lessor.

3. There, the lessor required a guaranty of payment. There is none here.

4. There, the lessee was granted the investment tax credit. Here, the lease gives it to the lessor which has used it.

U. C. Leasing, therefore, is readily distinguishable from the case before this court.

In *American Standard Credit*, the Fifth Circuit reversed the district court's holding that the equipment lease in question there was not a true lease. The seven factors which the court found to be crucial to its conclusion are each paralleled here. *Id.* at 266.

I have made no reference to defendants' argument that plaintiff is estopped or has waived its right to make the argument it has made here, because I do not find the elements of either defense in this record. No party justifiably relied to its detriment on any conduct of the plaintiff and there is no clear evidence of an intent on the part of the bank to give up this contention.

The bank has asked, in the alternative, that this court define what must be paid to the lessor to assume and

cure the lease default. The parties have neglected this issue and a further hearing will be held on Monday, July 8, 1985, at 9:30 a.m., in Courtroom 1406, 51 S.W. 1 Avenue, Miami, Florida, to consider (a) motions for rehearing, (b) to hear the parties on the amount required to cure the lease defaults, (c) to hear any other issue necessary to the entry of a judgment in this adversary proceeding and, (d) to consider the effect of this decision on the pending, chapter 11 plans.

DONE and ORDERED at Miami, Florida, this 24th day of June, 1985.

/s/ Thomas C. Britton
THOMAS C. BRITTON
Bankruptcy Judge

Copies
VANCE SALTER, ESQUIRE
STEEL HECTOR & DAVIS
Attorney for Plaintiff
SCOTT SHEFTALL, ESQUIRE
FLOYD, PEARSON, ET AL
Attorney for Miami Center J.V.
JOHN KOYZAK, ESQUIRE
Attorney for O & Y Florida
FRED H. KENT, JR., ESQUIRE
Attorney for Theodore Gould
Emmet Marvin & Martin
Attorneys for BONY
MEYER, WEISS, ROSE, ET AL
Attorneys for BONY

APPENDIX L

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re: HOLYWELL CORP., et al. Debtor(s).	CASE NO. 84-01590-BKC-TCB CHAPTER 11
HOLYWELL TELECOMMUNICATIONS COMPANY, and HOLYWELL LEASING COMPANY, Plaintiffs, vs. THE BANK OF NEW YORK, Defendant.	ADV. NO. 85-0906-BKC-TCB-A

MEMORANDUM DECISION

At the trial held on August 8 upon this adversary complaint, the parties agreed that the only issue to be decided is whether two agreements entered into in February, 1983 between the plaintiffs and Miami Center Limited Partnership are "true leases" or are "leases intended as security." The lessee is a chapter 11 debtor in this court. A prior adversary proceeding involving this same debtor and a lessor joint venture formed by T. B. Gould, another chapter 11 debtor in this court, and a third party, O&Y Equity Corp., was decided against The Bank of New York on this same issue concerning two other leases.

The lessors in this case are subsidiaries of the debtor which were formed to lease furniture, fixtures and electronic equipment necessary for the operation of the debtor's luxury hotel and office building. The features of the transaction which were previously considered in analyzing the "A" and "B" leases are factually similar. I considered the fact that the "C" and "D" leases provide that the lessee may take the investment tax credit is not determinative of a different intent since the lessors actually took the tax credit.

The factual differences from the prior proceeding do not require a different result. I conclude that the subject leases, identified as category "C" and category "D" leases, are true leases. It is not necessary to repeat the discussion relevant to this issue contained in this court's memorandum decision of June 24, 1985. The factors considered and the discussion are applicable to this case.

The bank was not misled or deceived in either case. The bank's argument the Gould is not to be viewed as an innocent party and that his multiple entities served to give him an advantage to the detriment of his creditors does not overcome the fact that the windfall it could receive if there were no other way to avoid this claim is not justified under these facts.

I also find that the bank's argument that Gould engaged in a "shell game" where a lessee/lessor relationship never existed does not meet the burden of proof to support its counterclaim that the leases were in fact financing agreements.

Subsequent events made it unnecessary, I believe to determine the amount required to cure the defaults on

these two leases. As required by B.R. 9021(a), a separate judgment will be entered declaring the category "C" and "D" leases to be true leases rather than security agreements.

DONE and ORDERED in Miami, Florida this 27the day of September, 1985.

/s/ Thomas C. Britton
Thomas C. Britton
Bankruptcy Judge

Copies to:

Scott D. Sheftall, Esquire
Attorney for Plaintiff
One Biscayne Tower, 25th Floor
Miami, FL 33131-1868

Vance Salter, Esquire
STEEL, HECTOR & DAVIS
4000 Southeast Financial Center
Miami, FL 33131-2398

APPENDIX M

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)	Cases Nos.: 84-01590-BKC-TCB
HOLYWELL CORPORTATION, et al.,	)	84-01591-BKC-TCB
Debtors.	)	84-01592-BKC-TCB
	)	84-01593-BKC-TCB
	)	84-01594-BKC-TCB
	)	Proceedings in Chapter 11

ORDER ON EMERGENCY MOTION TO TREAT PROCEEDS OF THE SALE AS CASH COLLATERAL, TO SEGREGATE AND ACCOUNT FOR CASH COLLATERAL

The Bank of New York ("BNY"), a secured creditor, moved this Court, pursuant to Bankruptcy Code §363 and Bankruptcy Rules 4001 and 9014, for an order to compel the Debtors in these jointly administered Chapter 11 proceedings to deem the proceeds of the sale of certain real and personal property (the "Washington Properties") pursuant to a Purchase Agreement dated as of July 26, 1984, as amended on August 28, 1984, between Hadid Investment Group as purchaser and Twin Development Corporation ("TDC"), 1300 North 17th Street Associates ("1300"), 1616 Reminc Limited Partnership ("1616"), Eleven Dupont Circle Associates ("Dupont Circle"), and Dupont Land Associates ("Dupont Land") as sellers (the "Purchase Agreement") as cash collateral.

The Court examined the memoranda which were filed both in support of and in opposition to the Motion

of BNY, and having heard representation by the attorneys for Debtors, Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould"), as well as argument by the parties hereto, the Court finds as follows:

(a) This Court entered an Order on the 11th day of December, 1984, requiring that all of the beneficial interests of Gould and Holywell to the net proceeds from the sale of the Washington Properties are to be placed in a segregated, interest bearing account and held pursuant to further ordered of this Court.

(b) BNY appears to have a first lien on the interests of Holywell and Gould in the net proceeds from the sale of the Washington Properties, except for an amount of $264,669. Attorneys for the Creditors' Committees did not object to the claim of BNY at this hearing, although they have reserved the right to contest BNY's claim to a first lien at a future time if they desire to do so.

(c) Holywell provides administrative support for each of the selling entities, their partners, limited partners, and to the service companies which heretofore have been providing services to the Washington Properties. It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

(d) Holywell, after the sale of the Washington Properties, no longer will have any source of income except from the net proceeds of the sale and any interest if may receive from the investment of those net proceeds. Therefore, Holywell requires the use of a portion of the net

proceeds of that sale in the immediate future to pay current, ordinary business expenses, including salaries, and will continue to require monies from either the net proceeds of the sale or interest income from the investment of those proceeds until such time as Holywell can wind up the affairs of those selling entities.

(e) BNY has agreed to the use of the proceeds of the sale and/or interest for the expenses of Holywell subject to the prior approval by BNY of those expenses, and has agreed to an amount of $70,000 to be released immediately for the payment of December salaries payable on December 31, 1984, and other business expenses payable in January, 1985.

Upon consideration of the following, it is ORDERED and ADJUDGED as follows:

1. This Court's Order of December 11, 1984 shall continue unchanged except as supplemented herein.

2. The net proceeds of the Washington sale constitute cash collateral as defined in §363 of the Bankruptcy Code.

3. The Bank of New York has a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington properties, as well as the interest which shall accrue from the investment of those proceeds, except for an amount of $264,669. However, the Holywell and Gould Creditors' Committees or other creditors of Holywell and Gould, or the Debtors, may contest the lien of Bank of New York in subsequent, appropriate proceedings.

4. An amount of $70,000 shall be released immediately to Holywell to pay its salaries and other business

expenses due to December 31, 1984 and during January 1985.

5. Holywell shall submit to the Bank of New York each month its anticipated expenses, including salaries, for the subsequent month. If the Bank of New York approves those expenses as submitted, they will be released without further order of this Court.

DONE and ORDERED in Miami, Florida this 31 day of December, 1984.

/s/ Thomas C. Britton
Thomas C. Britton
U.S. Bankruptcy Judge

Copies to:

Fred H. Kent, Jr., Esq.
All Members of the Creditors' Committees
All Attorneys of Record

Service of this Order to be performed by Fred H. Kent, Jr.

APPENDIX N

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES AND THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION AND THEODORE B. GOULD,

Defendants.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

Herbert Stettin, Esq.
Attorney for Trustee
1 Southeast 3rd Avenue
Suite 2215
Miami, FL 33131

Frank DeLeon, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

Robert A. Mark, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.

Attorney for Debtor
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130

Theodore B. Gould
Pro Se
2564-B Ivy Road
Charlottesville, Va. 22901

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Chapter 11

Case No. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

IN RE: HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES AND THEODORE B. GOULD

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION AND THEODORE B. GOULD,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court upon the Complaint of the liquidating trustee of the Miami Center Liquidating Trust (the "trust") against the United States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and

the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the preconfirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any, due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 Bankr. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the plan was substantially consummated. *Miami Center Limited Partnership v. Bank of New York*, Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities

include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541 (a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b) (3), (b) (4), and 6151. The government supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United States Code, or assignee . . . ," under 26 U.S.C. § 6012 (b) (3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b) (4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United

States Code [and payment] should be made by the fiduciary thereof." 26 U.S.C. § 6012(b) (4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I. J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b) (3), (b) (4) and *I. J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012 (b) (3) and (b) (4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-69 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I. J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012 (b) (3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and the government is misplaced for the Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trustee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him

in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation v. United States,* 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States,* 192 F. Supp. 776 (D. Minn. 1961), affirmed, 302 F.2d 666 (8th Cir. 1962), cert. denied, 371 U.S. 903, 83 S.Ct. 209, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012 (b) (3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012 (b) (3) or a fiduciary under 26 U.S.C. § 6012 (b) (4). The liquidating trustee's duties and powers under the plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust

assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012 (b) (3) OR (b) (4). *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012 (b) (3) and (b) (4) or elsewhere in the International Revenue Code. *Alan Wood Steel*, 7 Bankr. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012 (b) (3) OR (b) (4) beyond the clear import of their language. *See Greyhound Corp*, 495 F.2d 863 and *Alan Wood Steel*, 7 Bankr. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. *See* Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 Bankr. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The

retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. § 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of its powers regarding the trust. 26 U.S.C. § 672(a). The liquidating trustee is not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-(1a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust – its corpus and any income earned therefrom – is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to

satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors' legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner,* the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner,* 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is

the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 Bankr. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner,* 53 Bankr. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue Code. *Sonner,* 52 Bankr. 859. *See also Stockton v. United States,* 335 F. Supp. 984, 986 (C.D.Ca.1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership v. Bank of New York,* Nos. 86-5286, 86-5386 (11th Cir. March 10, 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); *In re Northampton Corp.,* 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.,* 505 F. 2d 1011, 1014 (5th Cir. 1974); *See in re Hayhall Trucking, Inc.,* 67 Bankr. 681,684

(Bankr.E.D.Mich. 1986); *See also Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697,701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr.D.Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr.W.D.Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C.Cir. 1978). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28th day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

copies to:

Herbert Stettin, Esq.
Attorney for Trustee
1 Southeast 3rd Avenue
Suite 2215
Miami, FL 33131

Frank DeLeon, Esq.
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 14198
Ben Franklin Station
Washington, D.C. 20044

Robert A. Mark, Esq.
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
Attorney for Debtor
Museum Tower, Suite 2200
150 West Flagler Street
Miami, FL 33130

APPENDIX O

11 U.S.C. Section 506., *Determination of Secured Status,* provides, in relevant part, as follows:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.
>
> (c) The trustee may recover from property securing an allowed secured claim the reasonably, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. Section 503, *Allowance of Administrative Expenses,* provides as follows:

> (a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(6) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph.

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under Section 543 of this title, and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services other than in a case under this title;

11 U.S.C. Section 1141., *Effect of Confirmation*, provides as follows:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan, bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –

(i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

Supreme Court, U.S.
FILED
JAN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-917 (2)

In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

VANCE E. SALTER, Esq.
COLL DAVIDSON CARTER SMITH SALTER & BARKETT, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

[*Counsel of Record*]

Of Counsel:

THOMAS F. NOONE, Esq.
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10286
Tel: (212) 422-2974

S. HARVEY ZIEGLER, Esq.
KIRKPATRICK & LOCKHART
2000 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 374-8112

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

I.

Does this Court lack jurisdiction?

II.

Did the court of appeals correctly affirm the bankruptcy and district court orders allowing The Bank of New York's claim for reimbursement of attorneys' fees and expenses as a contractual unsecured claim?

TABLE OF CONTENTS

Page(s)

Issues Presented i

Table of Citations iv

Introduction 2

Statement of the Case 3

ARGUMENTS AGAINST GRANTING THE WRIT .. 9

I. LACK OF JURISDICTION 10

A. *The Petitioners Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction* 10

B. *This Court's Prior Denial Of Review Bars This Petition* 10

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE BANKRUPTCY AND DISTRICT COURT ORDERS ALLOWING THE BANK OF NEW YORK'S CLAIM FOR REIMBURSEMENT OF ATTORNEYS' FEES AND EXPENSES AS A CONTRACTUAL UNSECURED CLAIM 11

A. *All Three Lower Courts Correctly Determined That The Bank Has An Allowable Unsecured Contract Claim For Attorney Fees and Expenses* 11

B. *All Three Lower Courts Correctly Determined The Amount Of The Bank's Claim* 13

C. *The Petitioners' Arguments Are Meritless* .. 16

1. **Post-Confirmation Attorneys' Fees and Costs** 16

TABLE OF CONTENTS – Continued

Page(s)

2. Limitation to "Collection" Provisions... 17

3. Section 506(b) 17

4. The Alleged Inadequacy of the Fee and Expense Application 19

Conclusion 20

Certificate of Service 22

TABLE OF CITATIONS

Page(s)

OPINIONS:

Birmingham Trust Nat'l Bank v. Case, 755 F.2d 1474 (11th Cir. 1985) 9

Denis v. Liberty Mutual Ins. Co., 791 F.2d 846 (11th Cir. 1986) 16

Fehlhaber v. Fehlhaber, 681 F.2d 1015 (11th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) 16

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 9, 10

Holywell Corp. v. The Bank of New York, 59 Bankr. 340 (S.D. Fla. 1986) 6

In re Ely, 28 Bankr. 488 (E.D. Tenn. 1983) 12, 13

In re Garfinkle, 672 F.2d 1340 (11th Cir. 1985) 9

In re Ladycliff College, 56 Bankr. 765 (S.D.N.Y. 1985) 12

In re Martin, 761 F.2d 1163 (6th Cir. 1985) 12

In re Missionary Baptist Found. of Am., Inc., 24 Bankr. 970 (N.D. Tex. 1982) 12

In re Tri-State Homes, Inc., 56 Bankr. 24 (W.D. Wis. 1985) 12

In re 268 Ltd., 789 F.2d 674 (9th Cir. 1986) 12, 13

In re United Merchants & Mfrs., Inc., 674 F.2d 134 (2d Cir. 1982) 12, 13

LeLaurin v. Frost Nat'l Bank, 391 F.2d 687 (5th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968) 12

TABLE OF CITATIONS – Continued

Page(s)

Liberty Nat'l Bank & Trust Co. v. George, 70 Bankr. 312 (W.D. Ky. 1987) 12, 13

Miami Center Ltd. Partnership v. Bank of New York, 109 S. Ct. 69 (1988) 6, 11

Miami Center Ltd. Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 6

Rogers v. Lodge, 458 U.S. 613 (1982) 9

United Savings Ass'n v. Timbers of Inwood Forrest Assocs., Ltd., 108 S. Ct. 626 (1988) 18

United States v. Johnston, 268 U.S. 220 (1925) 9

United States v. Ron Pair Enter., Inc., 109 S. Ct. 1026 (1989) 19

UNITED STATES CODE:

11 U.S.C. § 101(4) 12

11 U.S.C. § 104(a) 16

11 U.S.C. § 362(d) (1) 19

11 U.S.C. § 501 12

11 U.S.C. § 506(a) 18

11 U.S.C. § 506(b) 13, 18

SUPREME COURT RULES:

Sup. Ct. R. 17.1 10

Sup. Ct. R. 28.1 4

TABLE OF CITATIONS – Continued

Page(s)

FEDERAL RULES:

Fed. R. Civ. P. 52 9

BANKRUPTCY RULES:

Bankr. R. 3001 12

Bankr. R. 8013 9

OTHER AUTHORITIES:

3 *Collier on Bankruptcy* ¶506.05 (15th Ed. 1986) 12

No. 89-917

In The

Supreme Court of the United States

October Term, 1989

IN RE: HOLYWELL CORPORATION, et al.,

Debtors,

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION, HOLYWELL CORPORATION,
CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

THE BANK OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

INTRODUCTION

The Petitioners are five affiliated debtors in consolidated proceedings who have presented their never-ending, frivolous, Guiness-Book-of-World Records claims and arguments over the past four years to:

Two different bankruptcy judges;

Ten different district court judges in over 50 separate appeals;

Eight judges of the United States Court of Appeals in 14 separate appeals and a petition for writ of prohibition and mandamus; and

This Court, in six separate petitions for review.[1]

In addition to the Petition in this case, there are two additional petitions for writ of certiorari currently pending before this Court. One petition for writ of certiorari was filed only on behalf of the Petitioner, Miami Center Limited Partnership.[2] The Bank of New York's brief in opposition in that case (filed December 1, 1989) was not even out the door when it received (November 29, 1989) a second petition for writ of certiorari filed on behalf of the same Petitioners that are before this Court on this Petition.[3] Just a few days later, the Petitioners served the

---

[1] In the three cases ruled upon to date by this Court, each petition was denied. Case Nos. 88-80, 87-1988 and 87-1989. References to the Petitioners' appendix will be denoted as "___ a," and references to the appendix to this Response are denoted "App. ___."

[2] Case No. 89-708.

[3] Case No. 89-864.

Petition in this case, which is their third petition for writ of certiorari in just a little over a month. Each of the petitions is frivolous. Each should be denied, as were the three petitions filed by these petitioners in 1988.

STATEMENT OF THE CASE

The five affiliated debtors – Theodore Gould ("Gould"), Miami Center Limited Partnership ("MCLP"), Holywell Corporation ("Holywell"), Miami Center Corporation ("MCC"), and Chopin Associates ("Chopin") – all filed voluntary petitions in bankruptcy on August 22, 1984. The bankruptcy cases initially were consolidated for joint administrative purposes, and the five debtor estates were later substantively consolidated by Order dated July 23, 1985.[4] Gould owned 100% of the stock of co-debtor Holywell, and also served as president and sole director of Holywell. In turn, Holywell owned 100% of the stock of co-debtor MCC, and Gould served as president and sole director of MCC. Gould and MCC were the sole general partners of co-debtor Chopin, and of co-debtor MCLP. All five debtors[5] were involved in developing the Miami Center Project, an office building and hotel complex in downtown Miami.

---

[4] Under the bankruptcy and equitable doctrine of "substantive consolidation," the assets and liabilities of related debtors are pooled, and the inter-debtor obligations are eliminated.

[5] For the purposes of this Response, the Petitioners will also be referred to as the "debtors."

Respondent, The Bank of New York (the "Bank")[6] was the lead construction lender for the Miami Center Project. Commencing in March of 1980, the Bank advanced to the debtors in excess of $196 million under the terms of a series of notes, mortgages and other loan documents.[7] The loans were in default as of February 1,

---

[6] Pursuant to Supreme Court Rule 28.1, the following is a listing of the relationships of the Bank of New York:

(a) Parent of the Bank – The Bank of New York Company, Inc.

(b) "Affiliates" of the Bank are:

BNY Holdings (Delaware) Corporation
The Bank of New York (Delaware)
The Bank of New York Overseas Finance, N.V.
Affinity Group Marketing, Inc.
ARCS Mortgage Corp. (Fla.)
ARCS Mortgage, Inc. (Calif.)
BNY Leasing, Inc.
Eastern Trust Company
The Bank of New York Life Insurance Co., Inc.
Capital Trust Company
BNY Financial Corporation
BNY Personal Brokerage, Inc.
Beacon Capital Management
The Bank of New York Trust Company, Inc.
The Bank of New York Trust Company of California
The Bank of New York Trust Company of Florida, N.A.
Leonard Newman Agency, L.P.

[7] On March 20, 1985, the bankruptcy court entered a final judgment validating the construction notes and mortgages held by the Bank. The validity and enforceability of the provisions of the notes and mortgages is not an issue before this Court. [App. 1].

1984, and the Bank commenced a state court foreclosure action in July of 1984. The debtors filed voluntary Chapter 11 proceedings on August 22, 1984.

The loans were evidenced by notes secured by mortgages and liens on real and personal property, and were cross-guaranteed, cross-collateralized and subject to the terms of certain additional loan documents. The notes and other documents evidencing, securing or otherwise relating to the loans are referred to collectively as the "Loan Documents."

On December 19, 1984, the Bank filed its proofs of claim (Nos. 228 through 232) in connection with the loans including pre-petition and post-petition attorneys' fees, costs and loan expenses pursuant to the terms of the Loan Documents, which were attached as exhibits.

On March 20, 1985, the bankruptcy court entered a Judgment Determining Amount, Validity, and Extent of Liens of The Bank of New York. In upholding the Bank's liens, the court stated:

> The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totaling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

[App. 1].

Both the debtors and the Bank filed proposed plans of reorganization. On August 8, 1985, the bankruptcy court confirmed the Bank's Plan (the "Plan"), the principal features of which were:

(a) substantive consolidation of the debtors' assets and liabilities;

(b) creation of a Liquidating Trust which would receive all of the assets of the consolidated debtors;

(c) the sale by the Liquidating Trustee to the Bank or its designee of the Miami Center Project, including all furniture, fixtures, and equipment, for a price of $255.6 million, consisting of (i) a credit for the Bank Debt, defined in the Plan to include principal, interest, attorneys' fees, and loan expenses, plus (ii) new cash over the amount of that credit; and

(d) the release of approximately $32 million of the Bank's cash collateral for use by the Liquidating Trustee in paying the allowed claims of creditors.

The debtors failed to obtain a stay pending review of the confirmation order. Thus, on October 10, 1985, the Liquidating Trustee began implementing the Plan in accordance with its express terms.[8]

[8] The district court affirmed the confirmation order, *Holywell Corp. v. The Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), and the Eleventh Circuit dismissed the debtors' appeal as moot, finding that "the plan had been substantially consummated and that . . . it had become legally and practically impossible to unwind the consummation of the plan or otherwise to restore the status quo before confirmation." *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1557 (11th Cir. 1988). This Court denied the Petitioners' petition for writ of certiorari from the Eleventh Circuit's order dismissing their appeal as moot. *Miami Center Ltd. Partnership v. Bank of New York*, 109 S. Ct. 69 (1988).

At the closing of the sale of the Miami Center Project on October 10, 1985 pursuant to the Plan, the Bank released the cash collateral and other security that it held as security for its claim for reimbursement of attorneys' fees and expenses, and voluntarily agreed to subordinate its claim for attorneys' fees and loan expenses to the claims of the Class 1 through 6 creditors as set forth in the Plan.[9]

On June 13, 1986, the Bank filed its Application for Allowance of Attorney's Fees, Costs and Loan Expenses (the "Fee and Expense Application") covering the period from June 9, 1983 through April 30, 1986. [App. 6]. The Liquidating Trustee, two other creditors, and the debtors filed objections. By Memorandum Decision, dated November 5, 1986, the bankruptcy court determined:

> The Bank's timely claims 228 through 232 which were filed in this case expressly asserted its claim for attorneys' fees and costs. Those claims remain subject to consideration by the court as unsecured claims.

[30a].

Depositions of the Bank's Florida and New York counsel were taken, during which counsel testified at length as to the scope of the legal services rendered as

---

[9] Under the Plan, the Bank's claim for attorneys' fees and loan expenses was part of the Bank's Class 2 claim. However, because the bankruptcy court, at the time of the closing (October 10, 1985), had not determined the amount of fees and expenses, the Bank agreed to postpone payment until the creditors in Classes 3 through 6 were paid. This allowed hundreds of creditors (that had been waiting for payment for two years) to be paid without further delay.

well as the background and experience of the lawyers performing such services. Pursuant to the Memorandum Decision dated November 5, 1986, a hearing was conducted on November 20, 1986 with respect to the amount of the Bank's claim for attorneys' fees and expenses. Prior to that hearing, the Bank supplemented the Fee and Expense Application so as to spell out in greater detail certain of the legal services covered by the Fee and Expense Application. [App. 19]. At the bankruptcy court's request during the November 20th hearing, the Bank supplied additional information regarding the Fee and Expense Application in the form of an affidavit of Thomas F. Noone, the Bank's New York counsel.

On March 11, 1987, the bankruptcy court issued a Memorandum Decision on Amount of Bank's Fees and Expenses. [14a]. On April 9, 1987, the bankruptcy court issued the "Order Allowing Reimbursement of Attorneys' Fees and Expenses to The Bank of New York (M.C. Holdings Partners)," fixing the amount payable to the Bank. [App. 23].

The debtors then appealed the April 9th ruling by the bankruptcy court to the district court. On June 30, 1988, the district court issued its Order of Affirmance of the bankruptcy court's decisions of November 5, 1986 and March 11, 1987. [9a]. After the district court denied the debtors' motion for rehearing, the debtors then appealed to the Eleventh Circuit. The Eleventh Circuit affirmed *per curiam*. [5a].

ARGUMENTS AGAINST GRANTING THE WRIT

These Petitioners are now before this Court for a sixth time. This time, the "important question of federal law" that they ask this Court to review is a bankruptcy court's determination regarding the validity and amount of a creditor's claim for attorneys' fees and expenses. That issue is neither federal, nor important, nor of any constitutional dimension. The Bank's entitlement to the fees and expenses has already been determined by five different federal judges at three separate levels of the federal judicial system. This frivolous Petition falls woefully short of the standard for matters subject to this Court's jurisdiction.

The bankruptcy court's findings as to the validity and amount of the Bank's fees and expenses are inherently fact-based determinations subject to the "clearly erroneous" standard as given "strict application." Bankr. R. 8013; Fed. R. Civ. P. 52; *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985); *In re Garfinkle*, 672 F.2d 1340, 1344 (11th Cir. 1982).

This Court does not grant certiorari to review evidence and discuss specific facts (*United States v. Johnston*, 268 U.S. 220, 227 (1925)), and this is particularly true where findings of fact have been concurred in by both the court of appeals and the district court. *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). In the *Graver Tank* case, Justice Jackson stated: "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very

obvious and exceptional showing of error." 336 U.S. at 275. No error, much less any "obvious" or "exceptional" error, has been shown by the Petitioner here.

I.

LACK OF JURISDICTION

A. *The Petitioners Have Failed To Establish An Appropriate Basis For This Court's Certiorari Jurisdiction*

The Petitioners not only have failed to establish any of the considerations governing review on certioari, but also have failed to even point to any basis for this Court's certiorari jurisdiction. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered." Sup. Ct. R. 17.1.

The Petitioners, not satisified with an appeal to the district court and yet another appeal to the Eleventh Circuit, now seek this Court's certiorari jurisdiction. This Court, however, does not sit as a third level of review to decide fact-based issues that do not raise any important question of federal law. Consequently, the Petitioners' failure to point to any conflict or any important question of federal law weighs heavily against jurisdiction in this matter.

B. *This Court's Prior Denial of Review Bars This Petition*

The amount of attorneys' fees and collection fees to the Bank is a matter provided for, and governed by, the confirmed Plan [42a]. The debtors' current petition claims

that the Plan is defective because it could not, as a matter of law, authorize such an award.

But this Court has already closed the door on attacks on the Plan. Any objections by the debtors to the Plan were ruled upon by the district court when the confirmation order was affirmed, by the court of appeals' order dismissing the debtors' further appeal, and by this Court's refusal in 1988 to review further the debtors' complaints about the Plan. 109 S. Ct. 69 (1988).

The doctrine of *res judicata* or "law of the case" precludes the re-litigation or further review of these frivolous claims.

II.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE BANKRUPTCY AND DISTRICT COURT ORDERS ALLOWING THE BANK OF NEW YORK'S CLAIM FOR REIMBURSEMENT OF ATTORNEYS' FEES AND EXPENSES AS A CONTRACTUAL UNSECURED CLAIM

A. *All Three Lower Courts Correctly Determined That The Bank Has An Allowable Unsecured Contract Claim For Attorney Fees and Expenses*

The bankruptcy court correctly determined that the Bank has an allowable *unsecured contract claim* for attorneys' fees and expenses. In the November 5, 1986 Memorandum Decision on Estate's Liability for Bank's Fees and Expenses, the bankruptcy court stated:

> Although § 506 does not expressly preserve an unsecured claim, it does not foreclose one. I see no reason to presume that the unsecured claim is barred simply because it exceeds the value of

> the pledged collateral. 3 *Collier on Bankruptcy* ¶506.05 n.5 (15th Ed. 1986).

[30a].

The provisions of the Loan Documents clearly established the Bank's right to claim its legal fees and expenses in connection with the loans and the collateral, as incurred both before and after the filing of the bankruptcy petitions. 11 U.S.C. § 101(4). Based on its contractual right to payment, the Bank timely filed proofs of claim (Nos. 228 through 232) for pre-petition and post-petition fees and expenses. It is clear that the Bank's claims were allowable, whether secured or unsecured. Bankr. R. 3001 *et seq.*; 11 U.S.C. § 501 *et seq.*

Numerous bankruptcy and appellate courts have specifically addressed the issue of the ability of unsecured or undersecured creditors to recover attorneys' fees and expenses as unsecured contractual claims. *In re United Merchants & Mfrs., Inc.*, 674 F.2d 134, 137-40 (2d Cir. 1982); *In re Ladycliff College*, 56 Bankr. 765, 769 (S.D.N.Y. 1985); *In re Ely*, 28 Bankr. 488, 491-92 (E.D. Tenn. 1983); *In re Tri-State Homes, Inc.*, 56 Bankr. 24, 25-26 (W.D. Wis. 1985); *In re Missionary Baptist Found. of Am., Inc.*, 24 Bankr. 970, 971 (N.D. Tex. 1982); *In re 268 Ltd.*, 789 F.2d 674, 678 (9th Cir. 1986); *In re Martin*, 761 F.2d 1163, 1168 (6th Cir. 1985); *LeLaurin v. Frost Nat'l Bank*, 391 F.2d 687, 691 (5th Cir. 1968), *cert. denied*, 393 U.S. 979 (1968); *Liberty Nat'l Bank & Trust Co. v. George*, 70 Bankr. 312, 316-17 (W.D. Ky. 1987).

In the leading case, *United Merchants*, the Second Circuit held that an unsecured creditor had a provable claim in bankruptcy for collection costs, including attorneys' fees, pursuant to a contractual right. The appellate court in *United Merchants* specifically rejected the argument that Section 506(b) of the Bankruptcy Code precluded the unsecured contractual claim:

> UM&M asserts that the legislative history of section 506(b) indicates that the statute was intended to codify pre-Code law that only a secured creditor can assert a contractually-based right to recover collection costs. Section 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim*, its right to interest and costs arising under its credit agreement.

United Merchants, 674 F.2d at 138 (emphasis in original) (citation omitted). Furthermore, Section 506(b) does not preclude undersecured creditors from relying on contractual claims for attorneys' fees. *Ely*, 28 Bankr. at 491-92.

A creditor's unsecured contractual claim for attorneys' fees is treated the same as any other unsecured claim under Section 502. *George*, 70 Bankr. at 317; *268 Ltd.*, 789 F.2d at 678.

B. *All Three Lower Courts Correctly Determined The Amount Of The Bank's Claim*

The Fee and Expense Application covers the period from June 9, 1983 through April 30, 1986 and includes pre-petition expenses of $325,032 paid to Florida Power &

Light[10] and Turner Construction Company to preserve the Bank's collateral. The Loan Documents contain very broad language in connection with attorneys' fees and other expenses incurred by the Bank. For example, Section (4) of Article III of the Building Loan Agreement provides in pertinent part:

> (4) Borrower will (at the Initial Closing and thereafter promptly when due) pay Lender the Commitment Fee and Lender's Counsel Fees, and will pay all costs and expenses required to satisfy the conditions of this Agreement and *all costs, fees and expenses of whatsoever nature incurred by Lender in connection with the negotiation, consummation, execution, administration, assignment, sale and collection of the Loan,* without limiting the generality of the foregoing, Borrower will pay:
>
> (a) *Lender's Counsel Fees';*
>
> *To the extent Lender, after the Initial Closing, deems it necessary to employ counsel for whatever purpose relative to the Loan, the reasonable fees and expenses of such counsel shall be borne by Borrower.* Until the Loan is paid in full any fees and expenses incurred by Lender or its participants are to be paid promptly by Borrower. Borrower hereby agrees to indemnify and hold Lender harmless with respect to all fees and expenses described herein.

---

[10] If the Bank had not advanced this payment for electricity, the utility would have turned off power to an operating office building, hotel, restaurants, and parking garage. The debtors' relentless, never-say-die opposition to the recovery of such an advance by the Bank is what makes this petition and the appeals below particularly frivolous.

Section 30 of the first mortgage reads in pertinent part as follows:

> The term "attorneys' fees" as used in this Mortgage shall include, but not be limited to, attorneys' fees incurred in any and all judicial, *bankruptcy, reorganization,* arbitration, and any other proceedings, *including appellate proceedings, whether such proceedings arise before or after entry of final judgment.*

The other Loan Documents contain similarly-detailed provisions for reimbursement.

Following the Bank's filing of its Fee and Expense Application, the bankruptcy court held a hearing in connection with the services rendered and the expenses incurred. The testimony and evidence produced at the hearing, the documentary evidence contained in the Fee and Expense Application, the Supplement, the affidavits, and the depositions, fully support the amount allowed by the bankruptcy court.

As can be seen from that evidence, the bankruptcy court took a long, hard look at the Fee and Expense Application and the record, and disallowed substantial portions of the lawyers' time and costs. The bankruptcy court had been handling these proceedings for almost three years and was well aware of the complexity of the issues. With that background, the bankruptcy court found:

> Neither the debtors nor any other party had the means or the ability to untangle the mess brought to the court by the debtors. The Bank's counsel did all that could have been asked of them and they did it well.

[16-17a]. The bankruptcy court's determination of the amount allowable was not clearly erroneous, and was properly affirmed by the district court and affirmed *per curiam* by the Eleventh Circuit.

C. *The Petitioners' Arguments are Meritless*

1. Post-Confirmation Attorneys' Fees and Costs[11]

The provisions of the Loan Documents clearly established the Bank's right to claim its legal fees and expenses in connection with the loans and collateral, as incurred both before and after the filing of the bankruptcy petitions. 11 U.S.C. § 104(a). Contrary to the debtors' assertion, the confirmed Plan contained very broad language and went beyond limiting the Bank's reimbursement for attorneys' fees as a collection expense as of the closing date.

The district court's Order of Affirmance clearly recognized that the Bank's contractual claim for attorney fees and expenses included post-petition and post-confirmation fees:

> [The bankruptcy court] determined that The Bank of New York would be allowed a general unsecured claim, subordinate to the claims of other general unsecured non-insiders, for the *attorney fees incurred in collection of loans to*

---

[11] The Petitioners failed to raise this argument before the bankruptcy court, and are thus barred from doing so here. *Denis v. Liberty Mutual Ins. Co.*, 791 F.2d 846, 848-49 (11th Cir. 1986); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1029-31 (11th Cir. 1982).

Holywell, including fees incurred in the bankruptcy proceedings.

[9-10a] (emphasis added).

The controlling provisions for attorney fees and expenses in the Loan Documents are broadly drafted. There is no limitation of the attorney fee and expense provision to non-bankruptcy proceedings. The provisions of the Loan Documents contain broad and unambiguous provisions for reimbursement of all expenses incurred by the Bank in the bankruptcy and appellate proceedings, whether before or after confirmation.

2. Limitation to "Collection" Provisions

The debtors conveniently ignore the very broad language in the Loan Documents regarding the liabilities for attorneys' fees and other expenses incurred by the Bank in connection with the loans. The legal services in connection with the furniture, fixtures, and equipment litigation referred to by the debtors directly related to the Bank's collateral and were clearly within the scope of the provision of the Loan Documents regarding the debtors' liability for fees and expenses. Further, the bankruptcy court, being totally familiar with all the proceedings, including the Plan and the objections thereto and the furniture, fixtures, and equipment issues, determined that the litigation and appellate expenses were essential collection expenses. [22a].

3. Section 506(b)

The bankruptcy court correctly concluded that the Bank had an unsecured, contractual claim arising under the Loan Documents for attorneys' fees and loan

expenses. In the November 5, 1986 Memorandum Decision on Estate's Liability for Bank's Fees and Expenses, the bankruptcy court stated:

> Although § 506 does not expressly preserve an unsecured claim, it does not preclude one. I see no reason to presume that the unsecured claim is barred simply because it exceeds the value of the pledged collateral.

[30a].

As they did in the courts below, the Petitioners attempt to obfuscate the issue as to the status of the Bank's unsecured contract claim by applying the standards imposed by Section 506(b) of the Bankruptcy Code. The district court, in affirming the bankruptcy court's November 6th Memorandum Decision, specifically noted:

> This liability was predicated on 506(a), which "separates an undersecured creditor's claim into two parts: He has an secured claim to the extent of the value of his collateral; *he has an unsecured claim for the balance of his claim.*" Notes of Judiciary, Senate Report No. 95-989 (Emphasis added). The attorneys fees for collection of the debt are part of that claim.

[10a].

Based on that faulty premise, the debtors argue that, because the Bank was an unsecured creditor, Section 506(b) foreclosed recovery of the Bank's contract claim. The authorities cited in Section II A of this brief clearly permit the recovery by the Bank of its contract claim, whether secured or unsecured.

The debtors misconstrue *United Savings Ass'n v. Timbers of Inwood Forrest Assocs., Ltd.*, 108 S. Ct. 626 (1988).

The district court correctly noted that "the context of that case is completely inapposite: that case states that an unsecured creditor is not entitled to interest as compensation for delay caused by the automatic stay under 11 U.S.C. § 362(d)(1)." [11a at n.3]. Further, *Timbers* did not involve a confirmed plan that provided for attorney fees as an unsecured claim. Thus, the debtors' reliance on *Timbers* is inappropriate here. Likewise, the Petitioners' reliance on *United States v. Ron Pair Enter., Inc.*, 109 S. Ct. 1026 (1989) is misplaced inasmuch as this Court construed Section 506(b) in that case.

In any event, the Bank is not seeking recovery, as part of its Class 2 priority secured claim, the Bank's contractual right to attorneys' fees and expenses under Section 506(b); therefore, the status of the Bank as an oversecured or undersecured creditor is simply not a relevant issue. The Bank is asserting only an *unsecured contractual claim* for attorneys' fees and expenses.

4. The Alleged Inadequacy of the Fee and Expense Application

A simple perusal of the Fee and Expense Application and Supplement will persuade the Court that this argument is baseless. At the bankruptcy court's request, affidavits were submitted to: (1) clarify the total amount of fees and expenses incurred by the Bank and M.C. Holdings Partners, the Bank's successor in interest, for the period covered by the Fee and Expense Application, (2) to clarify the items included in the pre-petition claim of $831,563.72, (3) to specify the amount of fees and expenses incurred by the Bank for the period June 9, 1983 through October 10, 1985 and by M.C. Holdings Partners,

from October 11, 1985 through April 30, 1986, and (4) to detail the amount of the $1 million credit that the Bank deleted from its Application referred to in paragraph 9 of the Fee and Expense Application. The debtors reviewed those documents and filed responses. The bankruptcy court, having before it the Fee and Expense Application, the Supplement, the affidavits, all of the objections, the evidence produced at the November 20, 1986 hearing, and the depositions, and having almost three years of first-hand experience with all of the bankruptcy proceedings, determined that the Bank had sustained its burden of proof. This was obviously a factual determination based upon the entire record, and has not been shown to be clearly erroneous.

CONCLUSION

The Loan Documents contain broad language providing for the recovery of fees and expenses, including collection expenses, by the Bank and its successors and assigns. The Bank duly filed proofs of claim, and the bankruptcy court entered judgment upholding the validity of the Loan Documents as a lien over the Miami Center Project. The confirmed Plan also provided for the payment to the Bank of those fees and expenses.

The amount of reimbursement for fees and collection expenses is an intensely factual issue which the debtors have not seriously challenged. The bankruptcy court reviewed evidence and testimony in abundant detail, reduced the amount claimed, and entered three separate

opinions. The debtors have not shown that the bankruptcy court's findings of fact as to the amount that should be awarded are "clearly erroneous," or that the district court or court of appeals committed error in reviewing the findings. Accordingly, this Court should deny the Petitioners' petition for writ of certiorari.

Respectfully submitted,

S. Harvey Ziegler, Esq.
Kirkpatrick & Lockhart
2000 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 374-8112

Coll Davidson Carter Smith
Salter & Barkett, P.A.
3200 Miami Center
201 S. Biscayne Boulevard
Miami, Florida 33131
Tel: (305) 373-5200

Of Counsel:

Thomas F. Noone, Esq.
Emmet Marvin & Martin
48 Wall Street
New York, New York
10286
Tel: (212) 422-2974

By: _____
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of January, 1989, a true and correct copy of the foregoing was mailed to:

ROBERT M. MUSSELMAN, ESQ.
MUSSELMAN & ASSOCIATES
413 Seventh Street, N.E.
Charlottesville, VA 22901
Tel: (804) 977-4500

THEODORE B. GOULD, *pro se*
2565-Ivy Road
Charlottesville, Va. 22901
Tel: (804) 295-7125

HERBERT STETTIN, ESQ.
2215 AmeriFirst Building
One Southeast Third Avenue
Miami, FL 33131
Tel: (305) 374-3353

By: _____
Vance E. Salter

APPENDIX

TABLE OF CONTENTS

PAGE

APPENDICIES

A. "Judgment Determining Amount, Validity, and Extent of Liens of The Bank of New York" entered by the bankruptcy court on March 20, 1985.....App. 1

B. The Bank of New York's "Application for Allowance of Attorneys' Fees, Costs, and Loan Expenses Incurred by The Bank of New York," served on June 13, 1986. (The exhibits to this Application which were extensive are not included as part of this Appendix but were a part of the record below)..... App. 6

C. The Bank of New York's "Supplement to Application for Allowance of Attorneys' Fees, Costs, and Loan Expenses Incurred by The Bank of New York," served on November 20, 1986. (The exhibits to this Supplement which were extensive are not included as part of this Appendix but were a part of the record below)..... App. 19

D. "Order Allowing Reimbursement of Attorneys' Fees and Expenses to The Bank of New York (M.C. Holding Partners)" entered by the bankruptcy court on April 9, 1987.....App. 23

APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CHAPTER 11

IN RE: HOLYWELL CORPORATION, et al., Debtors.	CASE NOS. 84-01590-BKC-TCB 84-01591-BKC-TCB 84-01592-BKC-TCB 84-01593-BKC-TCB 84-01594-BKC-TCB
THE BANK OF NEW YORK, a New York banking corporation, Plaintiff, vs. THEODORE B. GOULD, individually, as partner of CHOPIN ASSOCIATES, a Florida general partnership and as a general partner of MIAMI CENTER LIMITED PARTNERSHIP, a Florida limited partnership; MIAMI CENTER CORPORATION, a Florida corporation, as partner of CHOPIN ASSOCIATES, and as general partner of MIAMI CENTER LIMITED PARTNERSHIP; and HOLYWELL CORPORATION, a Delaware corporation, Defendants.	ADV.NO. 85-0160-BKC-TCB-A JUDGMENT DETERMINING AMOUNT, VALIDITY, AND EXTENT OF LIENS OF THE BANK OF NEW YORK

THIS CAUSE came to be heard on March 14, 1985 upon the Complaint of The Bank of New York (the "Bank") to determine the amount, validity, and extent of the Bank's mortgage liens. Having reviewed the pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. This Court has jurisdiction to hear and determine this cause pursuant to 28 U.S.C. §§ 157(B)(2)(K) and 1334, and has jurisdiction over the parties.

2. The Bank is a New York banking corporation located in New York, New York, and is a secured creditor of the Debtors as set forth in Proofs of Claim filed on December 20, 1984 in case numbers 84-01590-BKC-TCB, 84-01591-BKC-TCB, 84-01592-BKC-TCB, 84-01593-BKC-TCB and 84-01594-BKC-TCB.

3. Defendants, Theodore B. Gould ("Gould") and Miami Center Corporation, a Florida corporation ("MCC"), are the sole partners of defendant Chopin Associates, a Florida general partnership ("Chopin") and are the sole general partners of defendant Miami Center Limited Partnership, a Florida limited partnership ("MCLP").

4. Defendant, Holywell Corporation ("Holywell"), is a Delaware corporation with its principal place of business in Arlington, Virginia.

5. Gould, MCC, Chopin, MCLP and Holywell are the Debtors in the above-styled proceedings, having filed voluntary petitions in this Court under Chapter 11 of the Bankruptcy Code on August 22, 1984.

6. Chopin is the fee owner and MCLP is the ground lessee and the owner of all improvements and personal property on the real estate located in Miami, Dade County, Florida ("Miami Center Phase I"), as described in the loan documents attached to the Bank's Complaint in this action.

7. The due execution, delivery, recording, and authenticity of the notes, mortgages, and other loan documents is not in dispute.

8. The Bank advanced to the Debtors under the terms of the notes and mortgages the sum of $196,711,481.58, all of which is secured by the mortgages.

9. The Bank notified the Debtors by letter that the loans were in default at all times after January 31, 1984.

10. Accrued interest on the loans, determined by the Bank at the "contract" (good standing) rate, to March 14, 1985 is $33,103,184.24, and is secured by the Bank's mortgages. Based on a Prime Rate of 10.5% per annum, interest will accrue at $64,171.66 per day from March 14, 1985. Any change in the prime rate (whether up or down) will affect that daily interest figure.

11. Additional accrued interest on the loans, determined by the Bank, commenced February 1, 1984. That additional default interest of $4,528,077.11 is payable to March 14, 1985, and is secured by the loan documents. Based on a prime rate of 10.5% such default interest will accrue in the additional amount of $11,148.50 per day under the loan documents for each day from March 14, 1985 (for a total daily sum of $75,320.16). Any change in

the prime rate (whether up or down) will affect that daily interest figure.

12. The Bank claims additional amounts under the liens of the mortgages for pre-petition legal and loan expenses, totalling $831,563.72. The Court reserves ruling on whether all or some part of such legal and loan expenses should be added to the mortgage lien.

13. The lien of The Bank of New York in and to the Debtors' real and personal property identified in the loan documents as against the Debtors is superior to any other claim or interest of the Debtors in and to said real and personal property.

14. This Court will retain jurisdiction to grant such further relief as may be necessary and proper.

15. The Court finds and decides that the total lien of the Bank (including default interest from February 1, 1984) is $234,342,742.93 to March 14, 1985, plus per diem interest from March 14, 1985, at the rate of $75,320.16 per day.

16. This Final Judgment is subject to the Court's Order, dated March 20, 1985, respecting the scope of the 1983 and 1984 releases executed by the Debtors.

DONE and ORDERED in chambers at Miami, Florida, this 20 day of March, 1985.

THOMAS C. BRITTON
UNITED STATES
BANKRUPTCY JUDGE

cc: S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Fred H. Kent, Jr., Esq.
Irving M. Wolff, Esq.

APPENDIX B

UNITED STATES
BANKRUPTCY COURT
SOUTHERN DISTRICT
OF FLORIDA

CASES NO. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

IN RE:	)	
	)	
HOLYWELL CORPORATION, et al.	)	Proceedings Under
	)	Chapter 11
Debtors.	)	
	)	

APPLICATION FOR ALLOWANCE OF ATTORNEYS' FEES, COSTS, AND LOAN EXPENSES INCURRED BY THE BANK OF NEW YORK

TO THE HONORABLE THOMAS C. BRITTON, BANKRUPTCY JUDGE:

1. Applicant, The Bank of New York (the "Bank"), was proponent of a confirmed plan of reorganization in these Chapter 11 proceedings. Pursuant to applicable law and prior Orders of this Court, the Bank respectfully seeks reimbursement of legal and loan expenses paid to:

(a) The law firm of Emmet Marvin & Martin, 48 Wall Street, New York, New York;

(b) The law firm of Therrel Baisden & Meyer Weiss, 1111 Lincoln Road, Miami Beach, Florida 33139, and its former partner, S. Harvey Ziegler, Esq. (who

recently joined the Miami office of Kirkpatrick & Lockhart, 1428 Brickell Avenue, Miami, Florida 33131);

(c) The law firm of Steel Hector & Davis, 4000 Southeast Financial Center, Miami, Florida 33131; and

(d) Turner Construction Company, Miami, Florida; and

(e) Florida Power & Light Company, Miami, Florida.

2. On March 20, 1985, this Court entered a final judgment validating the construction notes and mortgages executed by the Debtors and held by the Bank (copy attached as Exhibit "A"). Under the terms of the notes, mortgages and related loan agreements, the Bank was and is authorized to recover its loan expenses and the reasonable attorneys' fees and other costs of collection. Paragraph 12 of that final judgment reserved ruling upon the pre-petition fees and costs in the amount of $831,563.72, and Paragraph 14 provided for the retention of jurisdiction for the determination of all such fees and costs. Thereafter, this Court ruled that the Bank should set this motion for hearing after the date that applications for "Class 1 Administration Claim" fee awards were to be heard and determined [C.P. No. 1072].

3. Pre-petition and post-petition collection expenses pursuant to the terms of the loan documents were also claimed by the Bank in its proofs of claim [No. 228 through 232; December 19, 1984].

4. The Bank has not previously applied for or received any compensation from, or reimbursement for expenses by, the Debtors, nor have any promises been

made to the Bank after the commencement of these proceedings concerning compensation for services rendered or to be rendered in this case. Section 503(b)(3)(D) of the Code authorizes the Court to award the Bank for its expenses incurred in "making a substantial contribution" in these cases. Section 503(b)(4) authorizes reasonable compensation for the Bank's attorneys to the extent that the Bank, through its attorneys, made such a contribution. Here, as in *In re Richton International Corp.*, 15 B.R. 854, 856 (Bktcy. S.D.N.Y. 1981), the Bank and its attorneys substantially contributed to the successful result in these proceedings. These authorities provide another and independently sufficient basis (in addition to the Bank's proofs of claim and the Final Judgment of March 20, 1985) for the reimbursement sought in this application.

NATURE OF SERVICES

5. As the Court is aware, the Bank's amended plan of reorganization:

(a) received the support of the creditors;

(b) was duly confirmed;

(c) has resulted in the satisfaction of approximately $300 million of claims and the payment of hundreds of creditors;

(d) Has kept the Miami Center Project intact and in continuous operation; and

(e) has been affirmed on appeal despite the most vigorous attack by the Debtors and their affiliates.

6. The professional services for which compensation is sought may be categorized as follows:

(a) Pre-petition legal services rendered by Emmet, Marvin & Martin in connection with the loans and the Bank's declaration of default and initial collection efforts (various negotiations and documents for the possible restructuring or extension of the Miami Center loans).

(b) Pre-petition legal services rendered by the Meyer Weiss firm and by Steel Hector & Davis in connection with the state court foreclosure action brought by the Bank, Case No. 84-27548-CA-28.

(c) Post-petition legal services rendered to the Bank by its counsel in preparing and filing proofs of claim; preparing, filing, and defending the plan, amendments, and stipulations that were ultimately confirmed; opposing the competing Plans proposed by the Debtors; establishing the validity, extent, and priority of the Bank's mortgage liens; defending the Bank and its participating lenders in a lawsuit brought in the United States District Court by the Debtors (Case No. 85-0228-Civ-Hoeveler); representing the Bank's interest in numerous adversary proceedings relating to the rights of the Bank, other creditors, the Debtors, and the Debtors' affiliates; representing the Bank in stay and appeal bond proceedings in the Bankruptcy Court, District Court, and United States Court of Appeals; defending the Bank's interests in the numerous appeals to the United States District Court, and in remand proceedings conducted by this Court; and implementing the terms of the confirmed plan.

7. With respect to the pre-petition expenses, the Debtors agreed (Exhibit "F", page 3, subparagraph "d")

that, as of June 11, 1984, such expenses were $429,200. Those expenses included legal fees to that date, as well as $186,796.75 paid to Turner Construction Co. for construction loan inspections and related work pursuant to the January, 1982 letter executed by the Debtors (Exhibit "G"). The Bank expended a further $138,236.72 for the June, 1984 Miami Center power bill, so that the project could continue to operate.

8. The legal services categorized and described generally in the preceding paragraphs are detailed in the exhibits attached to this application:

Exhibit	*Professionals*
"B"	Emmet, Marvin & Martin
"C"	Therrel Baisden & Meyer Weiss, And S. Harvey Ziegler, Esq.
"D"	Steel Hector & Davis

SUMMARY OF TIME AND COSTS

9. The professional services rendered by the Bank's lawyers total 16,053.2 hours, and have a value, at normal hourly rates, of $2,300,991.50. The weighted average hourly billing rate in this application is $143 per hour. For purposes of this application, the Bank has reduced its claim for reimbursement by $1,000,000 (over 40%) in recognition of two factors:

(a) Because the Bank relied upon the services of three firms, there were depositions, hearings, and conferences at which the Bank was represented by more than one lawyer. While the Bank sought to use the firms efficiently, and the team approach was extraordinarily productive, legal fees were increased as a result.

(b) The attached summaries of time and activities include approximately $300,000 in value for tasks relating to the ownership of the Miami Center Project rather than to the collection of the loans and to the related litigation. Matters relating to the October 10, 1985 closing, development order issues, Intercontinental Hotel agreement, and similar legal tasks have therefore been excluded from this application.

10. In the course of rendering professional services, the Bank's lawyers have also incurred actual, necessary expenses in the amount of $229,434.25, as detailed in attached Exhibits "B", "C", and "D".

FACTORS TO BE CONSIDERED

11. *The Time and Labor Required.* As is evident to the Court from its own experience with the five consolidated cases, the amounts in controversy (approximately $350 million, counting all claims, of which the Bank claimed over $240 million), the number of parties (over 600), and the extreme litigiousness of the Debtors*, all required the

---

* It is safe to say that Mr. Gould used every measure in his efforts to block the establishment of the Bank's lien and the confirmation and consummation of the Bank's Plan. In proceedings on January 14, 1986, this Court observed:

> The pattern that is apparent to me in the Holywell cases is that Mr. Gould has rather consistently elected to go to war with lawyers on his side and in court and not to seek a prompt decision one way or another, that is the apparent pattern.

Bank and its counsel to devote extraordinary time and labor to the resolution of a monumental jumble of state and federal lawsuits, tax claims, mechanics' liens, New York arbitration proceedings, management and service agreements, leases, payroll liabilities, and more.

12. *Novel and Difficult Questions.* The promulgation of a fair, equitable, and otherwise lawful plan was made extremely difficult by several factors, including:

(a) The Gould group's complex structure, and the labyrinthine relationships and inter-company debts between affiliates;

(b) The lack of a proper inventory and accounting for the Debtors' furniture, fixtures, and equipment;

(c) The sheer number and size of claims against the five estates, and the hundreds of objections to claims filed by the Debtors;

(d) The competition for priority among various kinds of creditors other than the Bank, including the IRS, the Dade County tax authorities, judgment creditors, litigants in over 20 then-pending lawsuits, former tenants, mechanics' lien claimants, and Mr. Gould's partners and affiliates;

(e) Phantom tax issues which the Debtors repeatedly raised (as a supposed drawback to substantive consolidation) but never specifically identified or proved;

(f) Novel issues of jurisdiction and reference as between this Court and the District Court, raised by the Debtors in March, 1985 in an effort to avoid going to trial in the adversary proceeding brought by the Bank to prove its lien, and requiring hearings in both Courts;

(g) The uncertain rights and interests of Mr. Gould and O&Y as partners of MCJV, because of the proceedings before a New York City arbitration panel, the United States District Court, and the United States Court of Appeals for the Second Circuit; and

(h) The proposal of competing plans by the Debtors, based on (i) an unusual contract with Hadid Investment Group, Inc., of Arlington, Virginia and (ii) the equitable subordination under 11 U.S.C. § 510 of the Bank's liens and claims.

13. *The Skill Requisite to Perform the Services.* The Bank's attorneys were required to apply a broad variety of legal and accounting skills, and relied heavily upon specialists, including those in the areas of:

(a) Bankruptcy and bankruptcy litigation;

(b) Banking and bank loan documentation;

(c) Construction law and construction litigation;

(d) Real estate law, including title work, loan documentation, landlord-tenant issues, and conveyancing;

(e) Taxation, including federal income taxes and local ad valorem taxes; and

(f) Usury and RICO claims (because such claims among others, were asserted by the Debtors against the Bank and its participants in the District Court in Case No. 85-0228-Civ-Hoeveler).

When possible and practical, work was delegated to associates or to paralegals in an effort to reduce expenses.

14. *The Amount Involved and the Results Obtained.* The Bank sought to protect over $240 million due in principal and interest. Pursuant to a creative creditor's Plan, and by agreeing to waive the higher "default rate" of interest for purposes of the Plan, the Bank has recovered real estate with an appraised value equal to the sum of the Bank's lien and the additional cash invested by the Bank. Junior creditors would have recovered little, if anything, in a liquidation, or if the proceedings had continued for another year (because of the enormous interest accrual, exceeding $2 million per month). Instead, junior creditors have (other than those affiliated with the Debtors) recovered 100 cents on the dollar, plus interest. The Bank protected the interests of the unaffiliated creditors by refusing to permit Mr. Gould's affiliates (including other Debtors and non-Debtors) to receive distributions until the unaffiliated creditors received full payment. To do otherwise would have resulted in equity-like distributions to claimants under Mr. Gould's control before the unaffiliated creditors received full payment. It was necessary for the Bank to proceed with all possible speed in order to prevent the accruing interest on the secured loan from destroying the concept of the Plan, and the availability of sufficient cash to pay unsecured creditors.

The Miami Center project, including the hotel and office building, has been kept in operation. The fact is of great importance to Miami's downtown development efforts. A liquidation might well have resulted in the shutdown of the facility, damaging the City's development image and momentum.

The Bank and its counsel wish to stop short of bragging, but respectfully submit that these reorganizations are a textbook example of what can and should happen in a complex real estate reorganization.

15. *The Experience, Reputation and Ability of the Attorneys.* Emmet, Marvin & Martin, a well-respected Wall Street firm, has provided legal services to The Bank of New York for over 150 years. The firm's Martindale-Hubbell listing is attached as Exhibit "E", in order that the Court may verify the background and experience of the firm's attorneys.

The local firms of Therrel Baisden & Meyer Weiss and Steel Hector & Davis are known to the Court.

16. *The "Undesirability" of the Case.* Representation of the Bank in these cases was by no means undesirable, and the Bank's attorneys are proud to have had that privilege. However, the rapid pace and broad scope of the proceedings, particularly during the periods between January and August, 1985 and between October, 1985 and March, 1986, did require extensive night and weekend work. Emergency hearings were conducted by District Judge Hoeveler at night, well after business hours, and by this Court on a Saturday. The stay and appeal proceedings were conducted on expedited briefing and argument schedules.

17. *The Nature and Length of the Professional Relationship.* Prior to these proceedings, Emmet, Marvin & Martin and Therrel Baisden & Meyer Weiss had represented the Bank in numerous matters.

18. *Awards in Similar Cases.* The compensation sought by the Bank's attorneys is commensurate with allowances in similar cases where comparable results have been obtained through the diligence and skill of counsel. Such compensation is reasonable in that the services rendered were of high quality and in that the compensation prayed for is based on hourly rates which the Bank's attorneys customarily charge commercial clients for services of the same type and quality.

19. *The Customary Fee.* For services of the type rendered the Bank in these reorganization proceedings, the Bank's attorneys would charge a private client on one of the following bases: reasonable fee for services rendered, fee based on hourly rates, contingent fee, or fixed fee. Reasonable fee for services rendered is, however, the usual and customary basis which the attorneys use to fix fees, except as to certain regular clients, who pay hourly fees.

20. *Whether the Fee is Fixed or Contingent.* The fees charged by the Bank's attorneys are not based upon a percentage of the funds or property recovered.

21. *Time Limitations Imposed by the Client or Other Circumstances.* In these cases, the Bank's counsel were frequently faced with tight deadlines for filing objections, their own Plans and amendments, adversary proceedings, and briefs. These cases precluded the Bank's primary lawyers assigned to the cases from undertaking other matters for most of the time the cases and related appeals have been pending.

WHEREFORE, the Bank respectfully prays for the reimbursement of pre-petition and post-petition professional fees of $1,300,991.50; reimbursement of actual, necessary costs incurred in the amount of $229,434.25; and pre-petition loan expenses of $325,033.47 (Florida Power & Light and Turner Construction), for a total payment of $1,855,459.22. All such fees, expenses, and costs have been paid by the Bank.

Respectfully submitted this 13th day of June, 1986.

Attorneys for The
Bank of New York

EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10005
Tel: (212) 422-2974

KIRKPATRICK & LOCKHART
1428 Brickell Avenue
Miami, Florida 33131
Tel: (305) 374-8112

By: /s/ Vance E Salter
for S. Harvey Ziegler
(on behalf of his present
firm and former firm,
Therrel Baisden &
Meyer Weiss)

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
Tel: (305) 577-2804

By:/s/ Vance E Salter
Vance E. Salter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail this 13th day of June, 1986 to the following parties:

FRED H. KENT, JR., ESQUIRE
KENT, WATTS & DURDEN
850 Edward Ball Building
P. O. Box 4700
Jacksonville FL 32201

RAYMOND W. BERGAN, ESQUIRE
WILLIAMS & CONNOLLY
839 17th St., N.W.
Washington, D.C. 20036

SCOTT D. SHEFTALL, ESQUIRE
FLOYD PEARSON RICHMAN GREER
WEIL ZACK & BRUMBAUGH, P.A.
One Biscayne Tower, 25th Floor
Miami, Florida 33131

JOHN W. KOZYAK, ESQUIRE
KOZYAK, TROPIN &
THROCKMORTON, P.A.
607 New World Tower
100 North Biscayne Blvd.
Miami, Florida 33132

ALBERT I. EDELMAN, ESQUIRE
PARKER CHAPIN FLATTAU & KLIMPL
1211 Avenue of the Americas
New York, New York 10036

IRVING M. WOLFF, ESQUIRE
HOLLAND & KNIGHT
1200 Brickell Avenue
P. O. Box 015441
Miami, Florida 33101

/s/ Vance E Salter
Vance E Salter

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	Case No.
HOLYWELL CORPORATION,	84-01590-BKC-TCB
MIAMI CENTER	84-01591-BKC-TCB
LIMITED PARTNERSHIP,	84-01592-BKC-TCB
MIAMI CENTER	84-01593-BKC-TCB
CORPORATION, CHOPIN	84-01594-BKC-TCB
ASSOCIATES, and THEODORE	
B. GOULD,	
Debtors.	

_____/

SUPPLEMENT TO APPLICATION FOR ALLOWANCE OF ATTORNEYS FEES, COSTS, AND LOAN EXPENSES INCURRED BY THE BANK OF NEW YORK

Applicant, THE BANK OF NEW YORK (the "Bank"), hereby supplements its Application for Allowance of Attorneys' Fees, Costs, and Loan Expenses Incurred by the Bank, filed on June 13, 1986 and respectfully submits the following:

1. By Memorandum Decision dated November 5, 1986 this court determined, inter alia, that the Bank's unsecured contractual claim "was properly before the Court and requires a further hearing for the determination of the amount of that claim". The contractual provisions relating to the recovery of attorneys' fees, costs and expenses are contained in the loan documents which are very voluminous. To assist the Court in reviewing this application and those contractual provisions attached hereto and titled Part I to this Supplement is a summary

of the principal contractual provisions contained in the loan documents.

2. The Emmet Marvin & Martin daily time entries which contain a description of the work performed and the time charged in this matter, which have been made available to all the objectants for review, are also very voluminous. To assist the Court in reviewing the legal services rendered by Emmet Marvin & Martin attached hereto and titled Part II to this Supplement is a summary, on a month to month basis, of the work done by Emmet Marvin & Martin on this matter from June 9, 1983 through April 30, 1986. The summary was prepared after physical review of the Emmet Marvin & Martin daily time entries, which entries specified the work done and the time charged. Copies of these daily time entries are being filed on November 20, 1986. The Emmet Marvin & Martin computer runs showing the time charges, without narrative for the period from June 9, 1983 through January 31, 1984 are attached hereto as Part III. The Emmet Marvin & Martin Computer runs, without narrative, for the period from February 1, 1984 through April 30, 1986 are attached to the Bank's Application for Allowance as Exhibit "B".

3. Attached hereto as Exhibit "A" is a copy of the Bank's check in the amount of $182,444 payable to the order of Turner Construction Company. The Florida Power and Light bill for June 1984 in the amount of $138,236.72 was paid by Meyer Weiss Rose Arkin Shampanier & Ziegler with funds provided by the Bank by wire transfer.

Respectfully submitted,

Attorneys for The Bank of New York

KIRKPATRICK & LOCKHART
1428 Brickell Avenue
Miami, Florida 33131
Tel: (305) 374-8112

By: /s/ S. Harvey Ziegler
S. Harvey Ziegler

STEEL HECTOR & DAVIS
4000 Southeast Financial Center
200 South Biscayne Blvd.
Miami, Florida 33131-2398
Tel: (305) 577-2804

By: /s/ Vance E. Salter
Vance E. Salter

Of Counsel:

THOMAS F. NOONE, ESQUIRE
EMMET MARVIN & MARTIN
48 Wall Street
New York, New York 10005
Tel: (212) 422-2974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Supplement to Application for Allowance of Attorneys Fees, Costs, and Loan Expenses Incurred by The Bank of New York were furnished by hand this 20th day of November, 1986 to the parties listed below:

Fred H. Kent, Jr., Esq.
Kent, Watts & Durden
1400 Florida National Bank Tower
225 Water Street
Jacksonville FL 32202

Albert I. Edelman, Esquire
1211 Avenue of the Americas
New York, New York 10036

John W. Kozyak, Esquire
Kozyak Tropin & Throckmorton, P.A.
2850 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131

Irving M. Wolff, Esq.
Holland & Knight
1200 Brickell Avenue
P. O. Box 015441
Miami, Florida 33101

/s/ S. Harvey Ziegler for
Vance E. Salter

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re:	:	Chapter 11
HOLYWELL CORPORATION, et al.,	:	Case Nos. 84-01590-BKC-TCB
Debtors.	:	84-01591-BKC-TCB
	:	84-01592-BKC-TCB
	:	84-01593-BKC-TCB
	:	84-01594-BKC-TCB

ORDER ALLOWING REIMBURSEMENT OF ATTORNEYS' FEES AND EXPENSES TO THE BANK OF NEW YORK (M.C. HOLDING PARTNERS)

Pursuant to this Court's Memorandum Decisions entered in these proceedings on November 5, 1986 and March 11, 1987, The Court now enters its Order awarding The Bank of New York and M.C. Holding Partners reimbursement for their attorneys' fees, prepetition expenses and costs. In order to determine the reimbursable costs, the Court directed that the sums sought in the amount of $229,434.25 as necessary costs be audited. Annexed hereto as Exhibit A is an enumeration of the costs disallowed in the total amount of $144,764.10. It is, therefore,

ORDERED that the Miami Center Liquidating Trust is charged with reimbursing The Bank of New York and M.C. Holdings Partners, jointly, the following sums for attorneys' fees and expenses in the total amount of $1,536,526.15:

Attorney's Fees 06/09/83 to 04/30/86	$1,126,824.00
Prepetition expenses (Turner Construction and Florida Power and Light)	325,032.00
Attorneys' expenses	84,670.15
TOTAL	$1,536,526.15

The Liquidating Trustee is directed to pay and discharge said sums in accordance with the order of priority previously established by duly entered orders of this Court.

DONE AND ORDERED in Miami, Florida this 9th day of April, 1987.

THOMAS C. BRITTON
THOMAS C. BRITTON
U.S. BANKRUPTCY JUDGE

Copies furnished to:

Irving M. Wolff, Esq.
S. Harvey Ziegler, Esq.
Vance E. Salter, Esq.
Thomas F. Noone, Esq.
Fred H. Kent, Jr., Esq.
John W. Kozyak, Esq.
Albert I. Edelman, Esq.
Raymond W. Bergan, Esq.

EXHIBIT A

CATEGORY		*AMOUNT*
Reproduction and photocopier charges		$ 78,127.15
Emmet Marvin & Martin	$24,582.20	
Harvey Ziegler	1,264.20	
Steel Hector & Davis	52,280.75	

Computer Research		$ 10,805.39
Emmet Marvin & Martin	$ 6,811.26	
Harvey Ziegler	-0-	
Steel Hector & Davis	3,994.13	
Word processing charges		$ 4,040.35
Emmet Marvin & Martin	-0-	
Harvey Ziegler	-0-	
Steel Hector & Davis	$ 4,040.35	
Overtime and Meals		$ 6,074.82
Emmet Marvin & Martin	$ 6,019.57	
Harvey Ziegler	-0-	
Steel Hector & Davis	55.25	
Carfare, local travel and parking		$ 2,891.74
Emmet Marvin & Martin	$ 2,550.29	
Harvey Ziegler	-0-	
Steel Hector & Davis	341.45	
Conference lunches and dinners		$ 2,315.48
Emmet Marvin & Martin	$ 2,183.53	
Harvey Ziegler	-0-	
Steel Hector & Davis	131.95	
Postage and Courier		$ 38,806.46
Emmet Marvin & Martin	$14,421.48	
Harvey Ziegler	6,607.02	
Steel Hector & Davis	17,777.96	
Lost luggage replacement and miscellaneous		$ 1,702.71
Emmet Marvin & Martin	$ 1,702.71	
Harvey Ziegler	-0-	
Steel Hector & Davis	-0-	
	TOTAL	$144,764.10

263320001/84:221